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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-1033

JOHN EVANS, Trustee in Bankruptcy for HEMPFIELD STORES, INC., a Bankrupt,
Petitioner,

v.

S. S. KRESGE COMPANY, a foreign corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JOHN EVANS, Trustee in Bankruptcy for
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v.

S. S. KRESGE COMPANY, a foreign corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner John Evans, Trustee in Bankruptcy for Hempfield Stores, Inc., a Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 2, 1976, which affirmed the judgment of the United States District Court for the Western District of Pennsylvania entered in favor of Respondent, S. S. Kresge Company.

OPINIONS BELOW

The following opinions are printed in the Appendix to this Petition:

1. Opinion of the Court of Appeals dated November 2, 1976 (unreported) (1a);

2. Opinion and Order of the District Court dated May 13, 1975, reported at 394 F. Supp. 817 (W.D. Pa. 1975) (25a).

3. Amended Order of the District Court dated February 11, 1976 (unreported) (79a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1976. This Petition for Certiorari is filed within ninety days therefrom. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is an agreement between two independent businesses, selling the same retail products in the same relevant market, to sell those products at identical prices saved from being a *per se* violation of Section 1 of the Sherman Act by the intention of the parties not to compete with each other?

2. Is it a *per se* violation of Section 1 of the Sherman Act for a trademark licensor to deprive its licensee of the right to exercise its own independent business judgment and to eliminate the licensee from the marketplace through a contractual requirement which compels the licensee to set all of its retail prices based upon the prices charged by the licensee's competitors?

3. Is it a *per se* violation of Section 1 of the Sherman Act for a trademark licensor to prohibit its supermarket licensee from selling certain goods customarily sold by supermarkets, particularly when that prohibition is aggregated with price-fixing requirements?

4. Is summary judgment appropriate when the legality of pricing and other marketing restraints is to be measured under the Sherman Act by the rule of reason and the party challenging the restraints has been denied the opportunity to discover facts concerning the nature, scope and effects of the restraints?

STATUTE INVOLVED

The relevant portion of Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States,...is declared to be illegal.

STATEMENT OF THE CASE

Petitioner is the trustee in bankruptcy for Hempfield Stores, Inc., a Pennsylvania corporation ("Hempfield"). He brought this action against Respondent under Section 1 of the Sherman Act, 15 U.S.C. §1, challenging as unlawful certain restraints which Respondent contractually imposed upon Hempfield. These restraints were imposed through trademark and service mark license agreements which included retail price controls and a prohibition against dealing in certain competing goods. The District Court and the Court of Appeals found all of the restraints to be reasonable and lawful as a matter of law.

Prior to September, 1963, Respondent ("Kresge"), a nation-wide five-and-dime store chain, embarked on its K Mart store marketing program. The thrust of the marketing approach was the combination of a large, Kresge-owned K Mart discount or department store with an adjoining licensed K Mart Food supermarket to increase customer traffic. The greater consumer attraction provided by the department store — supermarket combination was described by Kresge as "one-stop shopping." Because Kresge had no experience in operating supermarkets, it decided to contract with others to own and operate supermarkets in the shopping complexes.[1]

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[1]Kresge experimented with owning and operating its own K Mart Food supermarket at one location, but abandoned the idea because the Kresge supermarket operation was unsuccessful.

Kresge undertook the K Mart "one-stop shopping" enterprise on a nationwide scale. It acquired and owns the registered trademark and service mark "K Mart," which it licensed to supermarket operators. By May, 1971, there were at least 360 K Marts throughout the United States, with licensed K Mart Food supermarkets operated by others at approximately 320 of these locations. In 1963 and 1964, Kresge licensed Hempfield to use the "K Mart" name in operating two supermarkets in Western Pennsylvania. Each supermarket was located in a multistore shopping center immediately adjacent to a Kresge owned and operated K Mart discount store. Both of these K Mart stores sold many of the same items at retail as did Hempfield's supermarkets.

Kresge's standard license agreements required the parties to sell "like items," i.e., items sold by both the supermarket and the adjacent K Mart store, at identical retail prices. One of the licenses stated the requirement as follows:

> 2....Identical selling prices, which shall be competitive for the shopping area, shall be maintained at all times on identical items sold by both the Licensor [Kresge] and Licensee [Hempfield]. If the parties are unable to mutually agree as to the selling price of any such item, the sale price of the item for both the Licensor and the Licensee shall be established by the Licensor and adhered to by the Licensee.... The Licensor and Licensee shall consult at weekly intervals, and more frequently if necessary, to provide each other with sufficient advance information to continuously coordinate this pricing policy.

In 1965, pursuant to the authority set forth in the license agreements, Kresge imposed Rules and Regulations which were applicable to all K Mart Food licensees. They contained the following horizontal, identical pricing requirement:

> PRICING — On non-exclusive, non-food items permitted in Licensee's assortment and also carried by Licensor, Licensor and Licensee will maintain identical competitive prices which have been mutually established. On special sales or promotion of any of these goods by either Licensee or Licensor the offered price is to be met or the goods removed from sale for the duration of the promotion. Licensor and Licensee shall provide each other with sufficient advance information to provide for a coordinated operation.

Kresge was the final price arbiter when the parties could not agree.

To facilitate price communications between the K Mart store management and Hempfield's management, Kresge prepared and provided Hempfield with identical merchandise lists and "Identical Pricing Comparison Books." These identical price books were intended to be used and were used to determine the prices to be charged by both parties on "like items". As Kresge's instructions unabashedly put it — "Communications are essential to equalizing prices!" The "Identical Pricing Comparison Books" contained detailed instructions to Kresge's K Mart store managers on the day-to-day mechanics of price-fixing.

In addition to controlling the prices of "like items", Kresge dictated the prices of all other goods sold by Hempfield through a scheme compelling Hempfield to set all of its prices at or below the prices of each of its competitors. As stated in one of the agreements, Hempfield was required to:

> ....carry adequate assortments...competitive or lower in price with the same or similar merchandise and products offered for sale in other discount food stores in the trading area.

To Kresge, "competitive" meant that Hempfield could charge no more for any item than the lowest price charged for the same item by any of its supermarket competitors, and Hempfield was so instructed.

These price control policies were national in scope and applicable to the hundreds of K Mart stores and licensed K Mart Food stores in the United States. Counsel for Kresge stipulated "...that throughout the period involved in this litigation from 1964 to 1969 it was the policy of S. S. Kresge through its K-Mart Stores to have insofar as possible identical prices on items carried by the K-Mart Stores and by the K-Mart Food Stores..."

In addition to the pricing restrictions, the license agreements also prohibited Hempfield from selling certain merchandise sold by Kresge, even though such items were customarily sold by supermarkets. The agreements listed categories of food items which Hempfield could sell and then provided:

> The Licensee shall sell no other merchandise or services without the express permission of Licensor, and shall promptly remove from sale any merchandise that Licensor considers not to be within the foregoing classification.

Non-food items, a substantial part of a supermarket's inventory, were limited to 15% of the sales area.

Kresge policed Hempfield's operations for compliance with these restrictions. Its employees visited Hempfield's stores to secure compliance information. On periodic visits, Kresge checked the prices at which Hempfield was selling "like items" and insisted that Hempfield raise or lower all non-identical prices to equal Kresge's prices. The type of merchandise carried by Hempfield was checked and Hempfield was directed from time to time to discontinue

sales of certain items. Hempfield was obliged to comply with Kresge's instructions, and did so.

On numerous occasions Hempfield's representatives asked to be relieved of the obligation to comply with these restraints. On each occasion Kresge refused and insisted that Hempfield adhere to the license requirements.

One of the licenses gave Kresge the right to terminate it "[s]hould the Licensee fail, in Licensor's opinion, to adhere to the Licensor's standard for the conduct of business, or if the Licensee violates any of the other provisions of this License...". The other contained a similar clause which allowed Kresge to terminate for violations of its Rules and Regulations. In 1967, Kresge attempted to terminate Hempfield's licenses. Kresge's Vice President and a member of its Board of Directors testified that Hempfield's failure to comply with Kresge's pricing policies was a factor in Kresge's decision to terminate.

Both of Hempfield's stores closed in early July, 1969. Shortly thereafter, an involuntary petition in bankruptcy was filed in the United States District Court for the Western District of Pennsylvania. Kresge's restraints on Hempfield's conduct of its own business were a contributing factor in causing Hempfield's bankruptcy. The Petitioner filed this action against Kresge alleging that the contractual restraints violated Section 1 of the Sherman Act and caused substantial damages which he sought to recover for the benefit of Hempfield's creditors.

After the close of discovery, Kresge filed a motion for summary judgment on the issues of (1) subject matter jurisdiction, (2) the legality of its license agreements with Hempfield, and (3) the Petitioner's right to maintain the action in view of Hempfield's execution of the license agreements. Petitioner filed a cross-motion for partial

summary judgment on the same issues. By its Opinion and Order of May 13, 1975, the District Court found in favor of Kresge on the first two issues, holding that the court lacked subject matter jurisdiction because interstate commerce was not affected, and that the restraints in Kresge's licenses were not *per se* violations of the Sherman Act but were reasonable and lawful as a matter of law (23a).[2]

Petitioner appealed from the judgment for Kresge entered by the District Court. On November 2, 1976, the Court of Appeals affirmed the judgment. In its opinion, the Court of Appeals found that, contrary to the conclusion of the District Court, there was subject matter jurisdiction. The Court went on to hold, however, that the restraints imposed upon Hempfield by Kresge were not *per se* violations of the Sherman Act because Kresge and Hempfield were not competitors in view of the arrangement between them and their intention not to compete with each other. Applying the rule of reason test, the Court then concluded that the challenged restraints merely regulated and perhaps thereby promoted competition.

[2]The District Court did not rule on the issue of Petitioner's right to maintain the action.

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REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided federal questions under Section 1 of the Sherman Act in a way which is in conflict with applicable decisions of this Court.

1. **Is an agreement between two independent businesses, selling the same retail products in the same relevant market, to sell those products at identical prices saved from being a per se violation of Section 1 of the Sherman Act by the intention of the parties not to compete with each other?**

In holding that a naked price-fixing agreement may be reasonable and lawful because of the underlying intentions of the participants, the Court of Appeals is at total variance with the decisions of this Court. If this anomaly is allowed to stand, the adjudication of price-fixing cases will be thrown into the chaos which the *per se* rule seeks to avoid.[3]

The Court of Appeals acknowledged that Hempfield and Kresge were in fact independent businesses selling certain of the same non-food items to the consuming public at their adjoining stores. The proceeds of each sale went into the pocket of either seller Kresge or seller Hempfield and Hempfield was required to charge prices on "like items" identical to those charged by Kresge. The Court held, however, that these facts did not constitute price-fixing under the Sherman Act because the parties never intended to compete with each other. It reasoned that in view of "the

[3]"Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 n.10 (1972).

absence of this necessary element of 'competitors', a horizontal limitation cannot be made out" (18a). In reaching this conclusion, the Court of Appeals relied upon none of the multitude of price-fixing cases decided by this Court.

Prior decisions of this Court have expressly declared that the *per se* illegality of price-fixing under the Sherman Act is to be determined without regard to the motives or intentions of the parties. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310 (1956); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). An agreement to fix specified prices constitutes, without more, an illegal restraint under Section 1. *Albrecht v. Herald Co.*, 309 U.S. 145, 153 (1968). The Court has not waivered from this firmly established precept. It is too late for the Court of Appeals to now declare that price-fixing is perhaps not the pernicious, anticompetitive activity it has always been found to be.

The Court of Appeals reached this result by reasoning that the parties were not horizontal competitors because they never intended to compete with each other. But this Court rejected that argument in the same factual context in *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959). There, the Court held that the existence of competition does not depend upon the motivation of the parties.[4]

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[4] "...the variety and fabric stores, 'operating in the same cities and in the same shopping area, often side by side, *were competitors*, purchasing from Simplicity at the same price and then at like prices retailing the identical product to substantially the same segment of the public.'" [Emphasis added.] 360 U.S. 55, 62.

The Court also concluded that the parties were competitors even though they sold many dissimilar items:

"It may be, as Simplicity argues, that the sale of patterns is miniscule in the overall business of a variety store, but the same is true of thousands of other items. While the giving of discriminatory

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The holdings of the Court of Appeals and the District Court are contrary to the authorities of this Court. Under these authorities, Hempfield and Kresge were competitors in the sale of "like items" and Kresge's contract requirement that Hempfield had to sell such items at prices identical to Kresge's constituted a *per se* violation of Section 1 of the Sherman Act.

2. **Is it a per se violation of Section 1 of the Sherman Act for a trademark licensor to deprive its licensee of the right to exercise its own independent business judgment and to eliminate the licensee from the marketplace as a competitor by fixing or stabilizing prices in the marketplace through a contractual requirement which compels the licensee to set all of its retail prices based upon the prices charged by the licensee's competitors?**

The Court of Appeals did not specifically discuss Kresge's license requirement that Hempfield set all of its retail prices for items other than "like items" at levels at or below the prices charged by Hempfield's competitors. After holding that the parties were not competitors in the sale of "like items", the Court of Appeals went on to conclude that all of the restraints were reasonable and lawful.

But the consequence of this requirement is that prices in the market are raised, lowered, or stabilized in direct interference with the free play of market forces. This Court has held that even schemes which fix prices at competitive market levels or at maximum levels are unlawful *per se* because they destroy competition and restrain the ability of

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concessions to a variety store on any one isolated item might cause no injury to competition with a fabric store in its overall operation, that fact does not render non-existent the actual competition between them in patterns. It remains, and, because of the discriminatory concessions, causes further losses to the fabric store...." 360 U.S. 55, 63.

traders to sell in accordance with their own judgment. *United States v. Socony-Vacuum Oil Co., supra, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). As stated in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975):

> "...Nor was it necessary for petitioner to prove that the fee schedule raised fees. Petitioners clearly proved that the fee schedule fixed fees and thus 'deprive[d] purchasers or consumers of the advantages which they derive from free competition.'" 421 U.S. 773, 785.

Kresge's overall price control policy interfered with Hempfield's freedom to exercise its own judgment. Hempfield was not free to compete with other supermarkets in its market area. As a result, competition among the traders in that market area was restrained.

The Court of Appeals' premise that the price-fixing agreement here would be unlawful only if Kresge and Hempfield were horizontal competitors is also in conflict with decisions of this Court. *Goldfarb v. Virginia State Bar, supra*, highlights this error.

The defendants in *Goldfarb* were the Virginia State Bar, the administrative agency through which the Virginia Supreme Court regulated the practice of law in that state, and the Fairfax County Bar Association, which had published a suggested minimum fee schedule for use by attorneys. The Virginia State Bar and the Fairfax County Bar were not horizontal competitors for lawyers, for clients, for sales or in any other respect. Neither supplied goods or services to the other for resale to the public. These organizations did force price-fixing on local lawyers who were in competition with each other. And because they did so, this Court found the scheme to be unlawful price-fixing. Kresge similarly forced price-fixing on Hempfield, which was in competition with other supermarkets. The result of

this price-fixing scheme was the same. Competition among traders in the marketplace was lessened and trade was restrained within the meaning of the Sherman Act.

Surely the Virginia State Bar, a statutory state agency,[5] had a greater interest in protecting the public service aspects of the legal profession than Kresge did in promoting or protecting its commercial public image by fixing the prices charged by others. But even this important and laudable goal of protecting the public did not save the price-fixing requirement which the State Bar imposed upon practicing lawyers. This Court reemphasized in *Goldfarb* that "Congress intended to strike as broadly as it could in §1 of the Sherman Act...".[6] If that stroke reaches as far as a statutory state agency created to protect the public, then it must also reach as far as merchants such as Kresge.

3. Is it a per se violation of Section 1 of the Sherman Act for a trademark licensor to prohibit its supermarket licensee from selling certain goods customarily sold by supermarkets, particularly when that prohibition is aggregated with price-fixing requirements?

Hempfield was a potential competitor of Kresge's in the sale of various non-food items customarily sold by supermarkets. As a part of its overall anticompetitive scheme, Kresge elected to preserve for itself exclusively the benefits of selling such merchandise. In so doing, Kresge accomplished a horizontal allocation of customers between it and Hempfield. At the same time, the prohibition amounted to a boycott by precluding Hempfield from dealing in certain goods of others. Under the decisions of this Court, the prohibition was, therefore, a *per se* violation of the Sherman Act.

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[5] *Goldfarb v. Virginia State Bar, supra*, 421 U.S. 773, 790 n.20.

[6] *Id.* 421 U.S. 733, 787.

This Court dealt with the question of a restriction imposed by a supermarket owners' association on the right of its members to wholesale goods in *United States v. Topco Associates*, 405 U.S. 596 (1972). The Court held that such a restriction amounted to the regulation of the customers to whom Topco members could sell and, like territorial restrictions, constituted a limitation on competition and a *per se* violation of the Sherman Act.

By prohibiting Hempfield from selling certain merchandise customarily sold by supermarkets, Kresge was allocating customers to itself and excluding Hempfield as a competitor in the sale of that merchandise. It is apparent from the nature of the restraint itself that it had no purpose or effect except the elimination of competition. As the District Court put it:

> "...Kresge had an obvious reason for not wanting Hempfield to sell merchandise which was also sold in its stores . . ." (76a) 394 F. Supp. 817, 848.

Kresge could have permitted both stores to sell these items, just as they sold a great number of other "like items". Instead, Kresge chose to foreclose competition completely.

The prohibition also precluded Hempfield from purchasing merchandise from certain manufacturers and distributors which it otherwise would have purchased for resale. Agreements not to deal in the goods of others are illegal *per se*. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Even if this prohibition, standing alone, were not *per se* unlawful, its aggregation with unlawful price-fixing is enough to require its condemnation as an unlawful restraint. *United States v. Sealy, Inc.*, 388 U.S. 350, 356-7 (1967); also *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

4. Is summary judgment appropriate when the legality of pricing and other marketing restraints is to be measured under the Sherman Act by the rule of reason and the party challenging the restraints has been denied the opportunity to discover facts concerning the nature, scope and effects of the restraints?

In *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), this Court cautioned that summary judgment procedures should be used sparingly in complex antitrust litigation "where motive and intent play leading roles . . .". This same caveat was invoked in *White Motor Co. v. United States*, 372 U.S. 253 (1963), after the Court concluded that the vertical restraint involved could not be deemed a *per se* violation of the Sherman Act. Because the restraint had to be evaluated under the rule of reason, the Court concluded that summary judgment was improperly employed in view of the need to examine the economic impact of the business arrangement on competition. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), again emphasized that where the restraint may not fall into the *per se* category, application of the rule of reason required a more thorough examination of the purposes and effects of the practices involved. In all three cases, this Court reversed the grants of summary judgment and remanded the cases for trial.

This policy of caution in the use of summary judgment procedures to evaluate Sherman Act restraints under the rule of reason is especially applicable where the party challenging the restraints has been denied the opportunity to discover relevant facts concerning the nature and scope of the restraints and their effects in the marketplace.[7]

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[7] *See Umdenstock v. American Mortgage & Investment Co.*, 495 F.2d 589 (C.A. 10 1974).

During the course of discovery in this case, the District Court consistently denied Petitioner's attempts to discover important facts as to the identity of other K Mart Food licensees, the extent to which the restraints Kresge imposed upon Hempfield were imposed upon other licensees, Kresge's termination or threatened termination of other licensees, the volume of goods subject to the identical pricing policy which were sold by Kresge's two stores adjoining Hempfield's, as well as the volume of such items sold by other K Mart Food licensees. This information was sought by Petitioner in order to assist him in proving both subject matter jurisdiction and Kresge's liability under the Sherman Act. It was all relevant to a thorough evaluation of the restraints.

Petitioner challenged the denial of this discovery on appeal. He argued, in the alternative, that if the Court of Appeals should disagree with his position that Kresge's restraints were unlawful *per se*, the grant of summary judgment for Kresge should nevertheless be reversed and the cause remanded for the purpose of enabling Petitioner to pursue his discovery. Petitioner argued in his brief to the Court of Appeals that "By these rulings, the district court severly limited the Trustee in his discovery of facts relevant to proof of subject matter jurisdiction and liability . . .". The Court of Appeals erroneously concluded that Petitioner's desire for additional discovery was limited to establishing jurisdiction.[5] Because of this incorrect reading of the issue raised, the Court of Appeals failed to rule on the question and proceeded, instead, to evaluate the grant of summary judgment for Kresge by the application of the rule of reason to the truncated record.

The decisions of this Court make it clear that the application of the rule of reason under the Sherman Act

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[5] Pa. p.21 and 20a. n.31

requires a thorough examination of the precise nature and scope of the challenged restraints, of the business reasons for their adoption, their economic impact and their competitive impact in the marketplace. It was inappropriate here for the courts below to allow disposition of this case in favor of Kresge on summary judgment after Petitioner was denied the opportunity to discover facts important to the evaluation of the restraints involved under the rule of reason.

CONCLUSION

For the reasons stated above, Petitioner prays this Honorable Court to grant this Petition For A Writ of Certiorari to review the important Sherman Act issues raised herein on the merits.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1782 & 76-1181

JOHN EVANS, Trustee in Bankruptcy for HEMPFIELD STORES, INC., a Bankrupt,
Appellant,

v.

S. S. KRESGE COMPANY, a Foreign Corporation,
Appellee.

APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Civil Action No. 71-85)

Argued February 27, 1976
Before: ADAMS, HUNTER and GARTH, *Circuit Judges.*

OPINION OF THE COURT
(Filed November 2, 1976)

GARTH, *Circuit Judge*

This appeal requires us to examine the business and license arrangement into which the parties entered to determine if the price and product restrictions imposed upon the licensee constituted an antitrust violation. We conclude that we have jurisdiction to conduct this inquiry and that the defendants did not violate Section 1 of the Sherman Antitrust Act by their marketing requirements.

The plaintiff, trustee in bankruptcy for Hempfield Stores, Inc. ("Hempfield"), brought this treble-damages suit under Section 4 of the Clayton Act, 15 U.S.C. §15, against the S. S. Kresge Co. ("Kresge") for its alleged violations of Section 1 of the Sherman Act, 15 U.S.C. §1.[1] The district court, 394 F. Supp. 817 (W.D. Pa. 1975), granted Kresge's motion for summary judgment. First, it held that subject matter jurisdiction was lacking, as "the activities complained of did not occur in the flow of interstate commerce, nor did they substantially affect it." 394 F. Supp. at 833. Second, despite its conclusion that jurisdiction was lacking, the court discussed and found that Kresge's conduct did not violate the Sherman Act: "the license agreements challenged here had a legitimate primary purpose; [furthermore,] the alleged restraints of trade were not unreasonable and are justifiable under the ancillary restraints doctrine." *Id.* at 849.[1a] Hempfield appeals from the judgment in favor of Kresge.[2]

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[1]Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business . . . by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, . . .

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal.

[1a]The district court declined to consider Kresge's third line of defense—the doctrine of *in pari delicto*, *see* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968). By reason of our disposition, we similarly express no opinion on that issue. Nor need we examine the district court's deferral to the bankruptcy court of certain issues raised by way of counterclaim *see* 394 F. Supp. at 824, 849, inasmuch as these issues have not been presented to us on this appeal.

[2]The district court's opinion of May 13, 1975 was not accompanied or followed by a separate order as required by F.R. Civ. P. 58, *see* Dougherty v. Harper's Magazine Co., 537 F.2d 758, 762 (3d Cir. 1976). Thereafter, an amended order entering final judgment pursuant to Rule 54 (b) was filed on February 11, 1976, at Docket No. 76-1181. The original action, at No. 75-1782, was then consolidated with No. 76-1181 for purposes of our review.

We conclude, contrary to the conclusion of the district court, that Sherman Act subject-matter jurisdiction was present. However, as we also conclude that on this record the alleged restraints of trade were justifiable under the rule of reason, we affirm the district court's judgment for Kresge.[3]

I.

Briefly, the facts are as follows:[4] Under the registered exclusive service trade name "K-Mart", Kresge operates a number of discount department stores. The district court's opinion states:

> Defendant has used the "K-Mart" trade name in an effort to develop a reputation as a low mark-up, highly competitive merchandiser selling quality merchandise at discount prices. From its inception the plan was designed and its success was dependent on high volume sales with a low per item profit margin. Kresge felt that the best way to achieve high volume sales was to draw on the potential buying power of those who made frequent food purchases. However, since Kresge had no

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[3]Reversal of a jurisdictional decision adverse to the plaintiff would normally require a remand to the district court for consideration of the merits. Here, however, the district court was careful to anticipate this possiblity, *see* 394 F. Supp. at 843, and thus made its analysis of the merits available to us. Additionally, we observe that the substantive and jurisdictional inquiries here bear marked similarities. We are satisfied that the district court's careful and separate consideration of the merits, although unnecessary to its holding, does not require a remand, particularly since there are no material facts in dispute. *See id.* In such circumstances, we may affirm a district court judgment, albeit on a different ground. *Cf.* PAAC v. Rizzo, 502 F.2d 306, 308 n.2 (3d Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975).

[4]The facts are set out in greater detail in the district court opinion, 394 F. Supp. at 824-27. That opinion informs us that "both parties agree that there are no issues of material fact precluding summary judgment." *Id.* at 843.

> prior experience in food merchandising and did not have any source of distribution, it elected to license its registered trade name to independent food store operators who would conduct a K-Mart Food Store operation as part of or adjacent to a K-Mart department store. This arrangement, it was felt, would provide "one-stop shopping" and enhance customer acceptance of the K-Mart program.

394 F. Supp. at 824. In 1964, Hempfield opened two food stores sharing the same building with K-Mart stores. By agreement with Kresge, Hempfield was permitted to use the name "K-Mart Foods" for a term of years at each store. Hempfield operated both stores until July 1969, when its leases were terminated. Hempfield's petition in bankruptcy followed shortly.

The Hempfield grocery stores, although "under one roof" with the K-Mart store, under the K-Mart name and thus presented to the public as a part of the K-Mart complex, were in fact run independently. Once past the supermarkets' K-Mart marquees, this independence became obvious:

> None of the goods sold by Hempfield was permitted to carry the K-Mart or any other Kresge brand name. Nor was Hempfield permitted to use the name "K-Mart" on its checks, its business stationery or even its pricing labels. Neither sold any goods or services to the other and Kresge did not dictate Hempfield's source of supply.[5]

Most of Hempfield's groceries came from a local Pennsylvania wholesaler, Fox Grocery Company. Still, Hempfield "received a substantial quantity of goods via direct shipment from out of state suppliers which amounted

[5]District Court Opinion, *id.* at 825.

to in excess of $400,000 per year at cost."[6] Gross annual sales at the two stores amounted to approximately four million dollars. Most of this amount came from the sale of groceries. A small percentage of Hempfield's sales (about 2-5%)[7] came from those non-food items "customarily found in grocery stores, *e.g.*, health and beauty aids."[8]

The district court summarized the various provisions of the license agreements giving rise to the plaintiff's complaint. Under these provisions, Hempfield was required to:

> (1) charge prices identical to those charged by Kresge on "like items," i.e., items sold by both the food stores and the department stores which prices were established by defendant in the event the parties were unable to arrive at a mutually agreeable price; [(2)] maintain merchandise "competitive" in price with the same or similar goods offered for sale in the trading area; (3) limit non-food merchandise offered for sale to specific categories of goods; (4) refrain from entering into fair trade agreements; (5) refrain from issuing trading stamps without express permission from Kresge; and (6) use certain equipment furnished by defendant.[9]

[6]*id.* The precise amount of such purchases cannot be determined, "as it appears that the bankrupt's records are incomplete in many respects." *Id.* The uncontradicted affidavit of Anthony Polito does disclose that Hempfield purchased merchandise from out-of-state suppliers during the *first half* of 1969 in the amount of $215,875.13. App. at 447a. "These records reflect interstate purchases, therefore, at an annual rate in excess of $430,000.00." *Id.*

[7]*See* 394 F. Supp. at 847.

[8]*Id.* at 825-26 (footnote omitted.)

[9]*id.* at 826. Although the district court discussed the restrictions concerning fair trade agreements, trading stamps and tie-in equipment, ruling in each instance against the plaintiff, the plainfitt has not raised these issues on this appeal. Accordingly, we limit our discussion and analysis to the pricing and product policies imposed by Kresge under its agreements.

Kresge responded by claiming a lack of subject matter jurisdiction and by denying that the restrictions contained in the agreements between the parties constituted unreasonable restraints of trade. In support of its motion for summary judgment, Kresge filed an affidavit of Frank J. Zapalla, Jr., who was the former secretary of SkatZap, Inc. (the predecessor corporation to Hempfield) and was the individual who negotiated the Kresge license that is the subject of this litigation. The uncontested portions of his affidavit reveal that (1) both parties fully intended that the food operation be presented to the public as one with the K-Mart department store;[10] (2) neither party contemplated or intended that it would compete with the other;[11] and (3) that the "like items" price restrictions were generally acceptable to Hempfield's predecessor[12] and applied only to goods not purchased from Kresge and, at the retail level, "freely available to the public at competitive prices in other stores throughout the [relevant] marketing area."[13]

For its part, Hempfield, in an effort to substantiate jurisdiction, sought additional pretrial discovery, which the district court denied. That ruling is appealed, as is the district court's grant of summary judgment in favor of Kresge.

II.

In holding that Hempfield's suit was barred by a lack of Sherman Act subject-matter jurisdiction, the district court characterized its inquiry as: "Does the defendant's conduct have a sufficient relationship with interstate commerce so as

[10] *See* ¶6, App. at 402a; ¶9, *id.* at 403a-04a, ¶12, *id.* at 405a; ¶17, *id.* at 407a.

[11] *See* ¶8, App. at 403a; ¶9, *supra*.

[12] ¶11, App. at 405a.

[13] ¶10, App. at 404a.

to be a proper subject of federal regulation?" 394 F. Supp. at 827.

The district court measured this relationship by the allegations in Hempfield's complaint. Those allegations, as the district court noted,[14] "must allege either (1) activities that are in the flow of interstate commerce, or (2) activities which though occurring purely on a local level substantially affect interstate commerce." *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 50 (3d Cir. 1973) (citations omitted.) In other words, the district court required the plaintiff to meet either the test of "in commerce" or that of "affecting commerce":

> If an alleged restraint occurs within the flow of interstate commerce, that is "in commerce," substantial effect on that commerce is presumed as a matter of law and no showing need be made that any particular amount of commerce has been affected. On the other hand, when dealing with restraints which are alleged merely to have affected interstate commerce, that effect must be substantial in order to justify federal regulation.

394 F. Supp. at 829. As our discussion need only address the "affecting commerce" test,[15] we focus our inquiry on the element of substantiality.

[14] 394 F. Supp. at 828.

[15] The district court devoted a considerable part of its opinion to the application of the "in commerce" test to the facts of this case. *See* 394 F. Supp. at 833-37. Our disposition of the jurisdictional issue relieves us of any need to consider the "in commerce" theory. *See Doctors, supra*, at 50-51:

> We have made no attempt to judge the adequacy of every one of the plaintiff's allegations on the interstate commerce issue since jurisdiction is established if any one of them satisfies either of the criteria for interstate commerce.

We thus express no opinion on the "in commerce" portion of the district court opinion.

As noted by the court in *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973):[16]

> There is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts.

Id. at 526.[17] The absence of such a bright line troubled this Court in *Doctors, supra*, and it remains to trouble us here.

Doctors involved a suit by a single hospital against the consortium that coordinated health care services in the Philadelphia area. Blue Cross, the defendant, sought to terminate the plaintiff hospital's membership, an action which plaintiff alleged had been taken in an attempt by Blue Cross to control all hospital services in the area. This Court, looking only to the fact that "the volume of supplies which are allegedly purchased by [the hospital] from companies located outside Pennsylvania each year [$233,430 in 1972] will be affected by the activities,"[18] found a substantial effect on interstate commerce and, therefore, held that Sherman Act jurisdiction was established.

The *Doctors* panel was careful to note, however, that the "affecting commerce" test would still be a bar to jurisdiction in some actions. 490 F.2d at 53-54, *citing Lieberthal v. North Country Lanes*, 332 F.2d 269 (2d Cir. 1964) *and Page v. Work*, 290 F.2d 323 (9th Cir.) *cert. denied*,

[16]And quoted by the court below. 394 F. Supp. at 830.

[17] *See also* Hospital Building Co. v. Trustees of Rex Hospital, 511 F.2d 678, 685 (4th Cir. 1975) (en banc), *rev'd.*, — U.S. —, 44 U.S.L.W. 4683 (May 24, 1976).

[18]*Doctors, supra*, 490 F.2d at 51.

368 U.S. 875 (1961). At the time the instant case was argued before us, this admonition weighed even more heavily upon us, as other Circuits had augmented our observation in opinions restricting Sherman Act jurisdiction. Chief among those cases was the Fourth Circuit's en banc decision in *Hospital Building Co. v. Trustees of Rex Hospital*, 511 F.2d 678 (4th Cir. 1975).

Hospital was a suit by the operator of a 49-bed proprietary hospital in Raleigh, North Carolina. The plaintiff hospital planned a major expansion that would increase its size to 140 beds. Its complaint alleged that Rex Hospital, a private tax-exempt hospital, acted in concert with other named defendants in an effort to block the proposed expansion and thus monopolize hospital services in Raleigh. The Court of Appeals found the principal "affecting commerce" allegations to be that "[n]either the hospital's interstate purchases of supplies and equipment, its billings to national insurance companies and the federal government, nor its purchases from its parent [out-of-state] corporation have increased as they would were the hospital to expand." 511 F.2d at 683-84 (footnotes omitted.) The court found these effects insufficient, reasoning that (1) the consequences were not the result of conduct directed at interstate commerce, and (2) the impact was "negligible." *Id.* at 684.

Hospital did not appear to furnish an answer to the jurisdictional question with which we were confronted. For example, the plaintiff hospital's out-of-state purchases found to be insufficient in that case totaled but $112,846, whereas Hempfield's out-of-state purchases were in the considerably larger amount of $400,000.[19] It thus appeared that Hempfield's complaint would present a case squarely astride this indistinct jurisdictional line. Upon the Supreme Court's

[19]*See* footnote 6 *supra*.

grant of certiorari in *Hospital*, 423 U.S. 820 (1975), we elected to delay our decision in this case to await its disposition. The Supreme Court's reversal in *Hospital*, — U.S. —, 44 U.S.L.W. 4683 (May 24, 1976), convinces us that the facts here warrant the assumption of Sherman Act subject-matter jurisdiction.

The Supreme Court found unpersuasive both of the factors considered by the *Hospital* Court of Appeals. First, the Supreme Court found that "the fact that an effect on interstate commerce might be termed 'indirect' because the conduct producing it is not 'purposely directed' toward interstate commerce does not lead to the conclusion that the conduct at issue is outside the scope of the Sherman Act." 44 U.S.L.W. at 4685.[20] Second, and more important for present purposes, the Court found that an adverse impact on out-of-state businesses or on market price need not be shown: "since in this case the allegations fairly claim that the alleged conspiracy, to the extent it is successful, will place 'unreasonable burdens on the free and uninterrupted flow' of interstate commerce, they are wholly adequate to state a claim." *Id.* The Court concluded that the "combination of factors" described above (*i.e.*, the decrease in prospective purchases of out-of-state goods; the decrease in prospective revenues from out-of-state insurance companies; and the prevention of the proposed expansion, which would require out-of-state financing) would be "certainly sufficient" to satisfy the "affecting commerce" test.

A fortiori, we regard the same result as mandated here. The amount of out-of-state purchases made by Hempfield—$400,000—far exceeds the $112,000 which the Supreme Court held to be sufficient for jurisdictional purposes in *Hospital*. Further, the record reflects that the pricing policy

[20]In reaching this conclusion, the Supreme Court discussed Burke v. Ford, 389 U.S. 320 (1967).

attacked by the plaintiff was a standard feature in Kresge's nationwide licensing agreements governing K-Mart food stores, which by 1971 numbered in excess of 300. This pricing policy, when considered with the amount of the plaintiff's out-of-state purchases, in our view more than meets the jurisdictional threshold established in *Hospital*.[21] Our review of this record in light of *Hospital* therefore, convinces us that the district court erred in granting summary judgment for Kresge on the basis of a lack of subject matter jurisdiction.[22] Having concluded that there is jurisdiction, we turn to the merits of plaintiff's complaint.

III.

Hempfield contends that the pricing and product restrictions imposed by Kresge are illegal *per se* within the contemplation of the Sherman Act. Kresge, on the other hand, disputes the illegality of its admitted restrictions, claiming that these restrictions must be tested by the rule of reason and, when so measured, must be found to be reasonable and therefore, permissible.

In its recent discussion of these concepts in *United States v. Topco Associates*, 405 U.S. 596, 606-08 (1971), the Supreme Court said:

[21]Our disposition of the jurisdictional issue presented here moots any need for us to discuss the discovery issue raised on appeal by the plaintiff. Our reading of plaintiff's brief as respects this issue reveals that plaintiff's desire for additional discovery was limited to establishing jurisdiction by virtue of Kresge's nationwide operations. *See* Brief for Appellant at 37-42. As stated, our conclusion that jurisdiction is present obviates any need to treat with this discovery issue.

[22]We recognize that the district court did not have the benefit of the Supreme Court's discussion in *Hospital* at the time it decided the jurisdictional issue. Had that opinion been available, the district court might well have concluded that jurisdiction existed.
Having determined that jurisdiction is present, we need not discuss the propriety of summary judgment in the context of a jurisdictional dispute in an antitrust case. *See* the district court opinion, 394 F.2d at 830-32.

On its face, §1 of the Sherman Act appears to bar any combination of entrepreneurs so long as it is "in restraint of trade." Theoretically, all manufacturers, distributors, merchants, sellers, and buyers could be considered as potential competitors of each other. Were §1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.). The history underlying the formulation of the antitrust laws led this Court to conclude, however, that Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition. In lieu of the narrowest possible reading of §1, the Court adopted a "rule of reason" analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. *Chicago Board of Trade v. United States, supra*, at 238.

While the Court has utilized the "rule of reason" in evaluating the legality of most restraints alleged to be violative of the Sherman Act, it has also developed the doctrine that certain business relationships are *per se* violations of the Act without regard to a consideration of their reasonableness. In *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958), Mr. Justice Black explained the appropriateness of, and the need for, *per se* rules:

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principal of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."

It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act. *See generally* Van Cise, The Future of Per Se in Antitrust Law, 50 Va. L. Rev. 1165 (1964). One of the classic examples of a *per se* violation of §1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, *e.g.*, manufacturers and distributors, which are termed "vertical" restraints. This Court has reiterated time and time again that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition."

Thus, before we can accept the *per se* argument urged upon us by the plaintiff here, we must analyze the business relationship between Hempfield and Kresge to determine: (1) whether it is one with which the courts have had "considerable experience", and (2) whether the challenged restrictions are "naked restraints of trade with no purpose except [the] stifling of competition." *Topco, supra*, at 608.

A.

At the outset, we observe that neither plaintiff nor defendant has brought to our attention any precedent or authority whereby the courts have evaluated in an antitrust context a business arrangement similar to the one established by the parties' agreements here. Nor has our independent research disclosed any legal or judicial antitrust analysis treating with this type of economic relationship.

The district court in its analysis of the parties' relationship believed that it resembled a franchise. The district court said:

> We believe that the analogy between the present agreements and franchise arrangements is further strengthened by the facts surrounding the initiation of the Hempfield-Kresge relationship as well as many provisions in the agreements including, *inter alia*, (1) Hempfield agreed that upon termination of the license agreements it would discontinue all use of the K-Mart or any related name; (2) Hempfield agreed to pay Kresge license fees as a percentage of gross sales in excess of a specified figure; (3) the parties agreed to a common advertising arrangement to be directed by Kresge, the cost of which was to be shared by Hempfield; and (4) there was an ongoing commercial relationship between the parties not only as to license fees and advertising but also as to other areas of operation.

394 F. Supp. at 844.

On the other hand, while we do not dispute that elements of a franchise may be found in the arrangement made between Kresge and Hempfield, we also recognize characteristics in that arrangement which are commonly identified with trademark licensing (*i.e.* Hempfield was permitted to use and to "trade under" the K-Mart insignia.)[23]

[23] We appreciate that a trademark license may not be used to avoid Sherman Act liability. *See* United States v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

In addition, to the extent that Kresge and Hempfield offered like products for sale and competed "as one" with other establishments, the two acted as "partners" in establishing and operating under joint merchandising and pricing policies.

Finally, if it was indeed necessary (which we do not think it is) to attribute a definitive label to the relationship created by the Kresge-Hempfield agreements, in our opinion that relationship would most aptly be characterized as a "concession". Hempfield, by operating under the K-Mart name and appearing as "K-Mart" to third parties in effect operated its own "concession" within the K-Mart complex.

For our purposes here, there is no necessity to fit this relationship into any one business category. Our only inquiry is whether there has been sufficient judicial examination of, and experience with, the hybrid business arrangement at issue here. We are satisfied that this kind of business arrangement has yet to be exposed to judicial review. Just as the Supreme Court required more knowledge of actual impact on competition in *White Motor Co. v. United States*, 372 U.S. 253 (1963), we too "need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack ... any redeeming virtue' and therefore should be classified as *per se* violations of the Sherman Act."[24] Accordingly, under the circumstances presented here, we cannot subsume the challenged restraints to *per se* treatment.

We turn, then, to the second step of our analysis of these restrictions' susceptibility to *per se* treatment. This requires a consideration of the restraints themselves to determine if they produce the "pernicious effect on competition" and exhibit the "lack of redeeming virtue," *Northern Pacific*, *supra*, that would require them to be deemed unreasonable.

[24] *Id.* at 263 (citation omitted.)

B.

The restraints normally found within the *per se* category are horizontal[25] limitations constituting "naked restraints of trade with no purpose except stifling of competition." *Topco, supra,* at 608. Horizontal restraints by definition require agreements between competitors.

> However, before we may say that ... agreements [imposing such restraints] are inherently unlawful, we must find that the agreements were made between competitors, actual or potential, dealing in competing products in a relevant market.

United States v. Columbia Pictures Corp., 169 F. Supp. 888, 893 (S.D. N.Y. 1961). Without such competition, the necessary precondition to a §1 violation is missing. Even if the license provisions challenged by the plaintiff were in the form of and had the substance of "naked restraints of trade," there would still be the need for such restraints to be imposed upon *competitors* for *no* purpose other than that of stifling competition.

Here, the relationship established by the parties demonstrates to our satisfaction that the necessary element of competition is lacking. The district court was similarly satisfied, stating as follows:

> We find that Hempfield and Kresge were not competitors. In the first place, the Kresge department stores and the Hempfield grocery supermarkets were designed to sell entirely different kinds of merchandise. That was the reason for the agreements. The fact that

[25]We recognize that while vertical restraints do not normally fall within the *per se* rule, in some instances, such as resale price maintenance, they may be conclusively presumed to be illegal. Here, however, no one contends that the agreements or practices constitute vertical restraints or that they would be so proscribed.

somewhere between 2% and 5% of merchandise sold by Hempfield was also sold by defendant's stores does not, in our view, require a finding that Hempfield and Kresge were competitors. On the contrary we believe it shows they were not. Therefore, a holding that Hempfield and Kresge competed would ignore the intensely practical business realities which underlie the antitrust laws.

In his affidavit, Frank Zapalla, one of the Hempfield incorporators, states:

> "It was never our intention, or Kresge's, that in any sense we were to be competitors of each other, for under the arrangement, we were both to be selling under one roof and under the name of K-Mart entirely different kinds of merchandise."

394 F. Supp. at 847.

We grant that certain non-food items were offered for sale by both Kresge and Hempfield. On the surface, this might appear to indicate that the parties were competitors in that the proceeds of each sale went into the pocket of *either* seller Kresge *or* seller Hempfield. As we view the substance of the transaction, however, both Kresge and Hempfield presented a common front under a common name to the customer. Therefore, whether the non-food item was purchased from Kresge or from Hempfield, it was as if that item had been offered for sale by Kresge alone, but at two different locations in its K-Mart establishment.[26] Here, the fact of noncompetition is dictated by the practical business arrangement of the parties, and indeed is disclosed as their

[26]The problem of customer confusion and possible ill will that would follow if different prices were charged for the same product offered at different locations in "one" store was foreseen and guarded against by the parties. *See* Affidavit of Frank Zapalla, App. at 401a-410a.

intent by uncontradicted affidavit.[27] If for no other reason than the absence of this necessary element of "competitors", a horizontal limitation cannot be made out.

Moreover, the challenged restraint enabled Kresge to add a food component to its discount operation without causing customer confusion or threatening the low-price "K-Mart" discounting image upon which the success of K-Mart (including K-Mart Food) would depend. Therefore, far from attempting to stifle competition, the restraints had as their purpose the stimulation of business and efficiency for both the department store and the supermarket: they (the restraints) would assure that the overall operation would compete effectively in both the discount and food markets vis-a-vis other department store and food discounters. The restraints thus serve a legitimate business purpose.[28]

We therefore conclude that the challenged restraints are not illegal *per se*.

IV.

Our treatment of the restraints under the rule of reason requires less discussion. Hempfield, as the plaintiff in this action, bore the burden of proof to establish that the licenses, restraints and business arrangements violated Section 1. *Shawyer & Son, Inc. v. Oklahoma Gas & Electric Co.*, 463

[27] *See id.* The need for unified business conduct under a concession arrangement is discussed in Jay Bee Apparel Stores, Inc. v. 563-565 Main St. Realty Corp., 130 Misc. 23, 223 N.Y.S. 537 (S. Ct. 1927), *aff'd* 226 App. Div. 721, 233 N.Y.S. 792 (4th Dep't 1929), albeit not in an antitrust context.

[28] As the district court noted:

> A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se. *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948).

394 F. Supp. at 843.

F.2d 204, 205-06 (10th Cir. 1975); *Venzie Corp. v. U.S. Mineral Products Co.*, 382 F. Supp. 939, 950-51 (E.D. Pa. 1974), *aff'd*, 521 F.2d 1309 (3d Cir. 1975); *Alders v. AFA Corporation of Florida*, 353 F. Supp. 654, 657-58 (S.D. Fla. 1973), *aff'd*, 490 F.2d 990 (5th Cir. 1974). *See also Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975). Hempfield has only marshalled arguments contending that the restraints that it finds offensive are subject to the *per se* rule, *see* Brief for Appellant at 14 *et seq*. It has failed to address itself to the issue of the restraints' legality under the rule of reason.[29]

The test under the rule of reason has been set out by this Court as follows:

> Despite the years since its pronouncement, *Chicago Board of Trade v. United States* remains the crucible for assaying the legality of a restraint under section 1. There, Justice Brandeis explained the sort of scrutiny that is required before a trial court may determine that a restraint of trade, not *per se* illegal, exceeds the bounds permissible under the rule of reason:
>
> > Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect,

[29] Apparently the plaintiff did not press this issue before the district court, relying, as it does here, on the *per se* theory.

> actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.
>
> [246 U.S. 231, 238 (1918)].

American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1246-47 (3d Cir. 1975). As noted, plaintiff has the burden of proving a Section 1 violation under the rule of reason.

In an attempt to expedite final determination of the case, the district court, after ruling on jurisdiction, went on to discuss the merits of the case.[30] In addressing the merits, the district court observed that "both parties agree that there are no issues of material fact precluding summary judgment." 394 F. Supp. at 843. Our examination of the record and the absence of any contention to the contrary by the parties[31] supports the district court's conclusion. Looking to the record, therefore, we find no evidence that could lead us to conclude that the restraints here imposed are "such as may suppress or even destroy competition." To the contrary, the only proofs in this record lead to the opposite conclusion. The uncontradicted affidavit of Frank Zapalla, who as one of the founders of Hampfield's predecessor had negotiated the Kresge license, reveals the following facts about the parties' relationship, the nature of the restraints, and their impact and purpose:

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[30] *See* note 5 *supra*.

[31] As noted previously, plaintiff's desire for further discovery was directed solely to the jurisdictional issue. *See* note 21 *supra*.

> 6. . . . I became aware that Kresge was interested in licensing food operators to use the K mart name for food supermarkets operated in conjunction with, but by management independent from, K mart discount variety stores. Kresge wanted the supermarket operated with the "discount" image of high volume and competitive prices. This concept appealed to Mr. Skatell and myself because such a common program would be mutually advantageous to both Kresge's department store and the food supermarket. We felt this would be particularly advantageous to the food supermarket because it would have the benefit of identification with the K mart name, its heavy advertising, and the additional flow of shoppers generated by K mart.
>
> . . . .
>
> 8. I reviewed the Kresge license agreement myself, and with Mr. Skatell. It contained limitations as to non-food items, both as to types of items and percentage of total area. We were interested in selling foods, and had no desire to compete with Kresge, or any other non-food stores in the shopping center, on non-food items and this limitation seemed completely reasonable to us. In addition, Greensburg Plaza, Inc. had a percentage lease with Kresge so any competition with the Kresge discount department store by the supermarket would have been self defeating.
>
> 9. It was never our intention, or Kresge's, that in any sense we were to be competitors of each other, for under the arrangement, we were both to be selling under one roof and under the same K mart name entirely different kinds of merchandise. Each was to complement the other. However, we both did realize that there would have to be some overlap, since traditionally, it was customary for food supermarkets to sell some non-food items. Kresge had a provision that to

the extent some goods would be sold in both stores, (a very small percentage of the food store inventory, mostly health and beauty aids—perhaps 5% at most), they would be sold at the same price. Once again, this was completely agreeable to us because we did not want to compete with another store using the K mart name. We intend to have the same type of low-price discount operation as to foods that Kresge had for variety items—so there was no conflict. We also realized that it would be to our mutual advantage to coordinate our prices of any items sold in common between the two stores to avoid customer confusion and to avoid damage to the K mart discount image.

10. All of the items sold in common were traditional national brand name or other private label products that were freely available to the public at competitive prices in other stores throughout the marketing area served by our stores. We bought none of these products from S. S. Kresge Company or any of its subsidiaries—and we were free to purchase them from any source we wished.

11. As to the "identical items" carried by both the discount department store and our own food supermarket, we were perfectly willing to follow the Kresge pricing pattern on a regular basis. We bought our health and beauty aids from a jobber also serviced by Fox Grocery, who would pre-price them and stock on our shelves. Our plan was for the jobber to check the K mart discount department store pricing and follow it.

12. On promotional items and advertised sales, the managers of each store were supposed to alert each other and the item being promoted would be removed from inventory during the special promotion. This was done to maintain the constant image of single, unitized ownership, and value.

. . . .

17. I agreed to this language[32] because it essentially accomplished one purpose of two separate operations under one name, and the identical pricing would avoid customer confusion and damage to the low price-discount image that we were both trying to accomplish.

. . . .

19. On entering into the two agreements referred to above with the Kresge Company, including the clauses on restriction of items and identical pricing on like items, we did so without any coercion or economic pressure from Kresge. As indicated earlier, we felt they were to our advantage as well as Kresge's.

App. at 402a-08a.

In view of these, the only "relevant facts", we have no hesitation in concluding, as did the district court, that the challenged restraints "merely regulate and perhaps thereby promote competition."[33] Certainly, these restraints—incidental and peculiar to this distinctive business relationship, adopted by the parties for the purposes described above, and designed only for the operation of a more efficient unified competitive entity vis-a-vis others—cannot be said to either "suppress" or "destroy" competition.[34] We hold, therefore, that on this record, the plaintiff

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[32]The language in question read:

On non-exclusive, non-food items permitted in licensee's assortment and also carried by Licensor, Licensor and Licensee will maintain identical competitive prices which have been mutually established. On special sales on promotion of any of these goods by either Licensee or Licensor the offered price is to be met or the goods removed for sale for the duration of the promotion. Licensor and Licensee shall provide each other with sufficient and advance information to provide for a coordinated operation.

¶16, App. at 407a.

[33]Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[34]*See id. See also* 8 Von Kalinowski, Antitrust Laws and Trade Regulation §59.06 [3] (1972), 1 Callman, Unfair Competition, Trademarks and Monopolies §15.5.3, at 465 (3d ed. 1976).

has not proved that the restraints offended Section 1 of the Sherman Act.

V.

We have concluded that summary judgment predicated on a lack of subject-matter jurisdiction should not have been granted. Having thus resolved the jurisdictional issue favorably to plaintiff, Hempfield's discovery claim has thereby been mooted.[35]

However, our analysis of the merits comports with the conclusions expressed by the district court in that we have found no basis for holding that the challenged restraints are illegal *per se*. Further, the record will not support a holding of Section 1 illegality under the rule of reason.

We will therefore affirm the district court's grant of summary judgment in favor of Kresge, not on the ground[36] that jurisdiction is lacking, but on the ground that no Sherman Act violation has been proved.

[35]*See* notes 21, 31 *supra*.

[36]*See* note 3 *supra*.

JOHN EVANS, Trustee in Bankruptcy for Hempfield Stores, Inc., a Bankrupt, *Plaintiff*,
v.
S. S. KRESGE COMPANY, a Foreign Corporation, *Defendant*.

Civ. A. No. 71-85.

United States District Court,
W. D. Pennsylvania.
May 13, 1975.

David R. Brown, Roslyn M. Litman, Pittsburgh, Pa., for plaintiff.

Andrew L. Weil, Pittsburgh, Pa., Henry T. Reath, Philadelphia, Pa., for defendant.

OPINION AND ORDER

McCUNE, *District Judge*.

Plaintiff, trustee in bankruptcy for Hempfield Stores, Inc., formerly Skat-Zap, Inc. (Hempfield) initiated this antitrust action in 1971 complaining that defendant, S. S. Kresge Company (Kresge), violated Section 1 of the Sherman Act, 15 U.S.C.A. §1 which provides, *inter alia*, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade...among the several States,...is declared to be illegal." Plaintiff claims injury and seeks damages under §4 of the Clayton Act, 15 U.S.C.A. §15.

Following prolonged and extensive discovery[1] defendant has renewed its motion for summary judgment.[2] In

[1]Jurisdiction has been in dispute since defendant's answer was filed. Much of the voluminous discovery proceedings has been concerned with the issue of subject matter jurisdiction raised by defendant's answer and prior motion for summary judgment.

[2]Defendant's prior motion for summary judgment was denied by Opinion and Order of March 14, 1972.

support of that motion, defendant advances three arguments: (1) that the court does not have jurisdiction over the subject matter of this action; (2) that the conduct complained of is neither per se violative of §1 of the Sherman Act nor unreasonable when examined by the "rule of reason" standard; and (3) that Hempfield's participation in the conduct complained of precludes any recovery by its trustee in bankruptcy as a matter of law.

Plaintiff has filed a cross motion for partial summary judgment in which it asks the court to determine that certain of the practices complained of are violative of §1 as a matter of law (per se violations). Plaintiff's brief in opposition to defendant's motion for summary judgment addresses each of the alternative arguments advanced by defendant in support of its motion. First, plaintiff contends that the jurisdiction of the court over the subject matter of this complaint has been established. In the alternative, plaintiff contends that the jurisdictional issue is inextricably intertwined with determination of the merits thereby precluding entry of summary judgment. Plaintiff also argues that the issue of subject matter jurisdiction must be determined by the trier of fact, a jury in this case, since defendant has demanded a jury trial. Second, as we have already mentioned, plaintiff claims that the activities complained of are per se violative of §1 of the Sherman Act. Finally, plaintiff denies that Hempfield's participation in the alleged price-fixing scheme and various other alleged restraints is a bar to its recovery.

Also before the court are a counterclaim by defendant seeking monies allegedly owed to it for unpaid rent and other itemized expenses and plaintiff's counterclaim in which plaintiff alleges that rent already paid for two months

constitutes a preference under §60 of the Bankruptcy Act, 11 U.S.C.A. §96.

The court has heard oral argument on the respective motions for summary judgment and has considered the briefs of both parties.

We turn now to the facts which give rise to the present controversy.

Facts

Defendant Kresge is incorporated under the laws of Michigan. It operates department stores in 48 states, the District of Columbia and several foreign countries. Some of those stores use the Kresge name while others operate under the name "K-Mart" which is defendant's registered exclusive service trade name.

Defendant has used the "K-Mart" trade name in an effort to develop a reputation as a low mark-up, highly competitive merchandiser selling quality merchandise at discount prices. From its inception the plan was designed and its success was dependent on high volume sales with a low per item profit margin. Kresge felt that the best way to achieve high volume sales was to draw on the potential buying power of those who made frequent food purchases. However, since Kresge had no prior experience in food merchandising and did not have any source of distribution, it elected to license its registered trade name to independent food store operators who would conduct a K-Mart Food Store operation as part of or adjacent to a K-Mart department store. This arrangement, it was felt, would provide "one-stop shopping" and enhance customer acceptance of the K-Mart program. This action is a direct result of

two such license agreements entered into between Hempfield (Skat-Zap) and Kresge.

Prior to August 12, 1963, two of the incorporators of Hempfield, Frank Zapalla, Jr., and Frank Nascone were the owners of a real estate development firm known as Maret Corporation which solicited and obtained long term lease commitments from Kresge for department stores in two shopping centers, one located in Westmoreland County, the other in Allegheny County. However, the commitments were contingent upon Kresge's ability to obtain a licensee who would operate a grocery store at each location. Hempfield was incorporated to operate the grocery stores.

Hempfield was incorporated on August 12, 1963, under the name of Skat-Zap, Inc. The incorporators and initial shareholders were Zapalla, Nascone, and Herman Skatell. Shortly thereafter on September 23, 1963, Hempfield and Kresge entered into a license agreement which authorized Hempfield to use the name "K-Mart Foods" for a period of twelve years at a retail supermarket located next door to the Kresge department store in the Westmoreland County shopping center. The store was designated K-Mart Food Store No. 4032. Approximately eight months later, the same parties concluded a second agreement which authorized Hempfield's use of the name "K-Mart" for a ten-year period at a store located in the Allegheny County shopping center. Kresge designated this K-Mart Food Store No. 4064.

Pursuant to these agreements, Hempfield opened Food Stores 4032 and 4064 in 1964 and continued to operate both until July, 1969, at which time the leases were terminated. Shortly thereafter, Hempfield filed a petition in bankruptcy.[3]

[3] *See* Civil Action No. 69-271, Western District of Pennsylvania, filed August 29, 1969. It also appears that a receiver was appointed by the Court of Common Pleas of Allegheny County at No. 3432, July Term, 1969, in a state dissolution proceedings.

During the years of its operation Hempfield went through a succession of ownerships. In 1967, a joint venture entity of which Gerald Loevner was the partner-in-charge assumed control of all outstanding shares until January, 1969, when Anthony Polito, who had been associated with the supermarkets in various capacities since 1965, purchased all Hempfield stock.

While the grocery supermarket and the department store at each K-Mart location were designed to appear to the public as a single entity providing "one-stop shopping," in fact, the stores were independently operated. None of the goods sold by Hempfield was permitted to carry the K-Mart or any other Kresge brand name. Nor was Hempfield permitted to use the name "K-Mart" on its checks, its business stationery or even its pricing labels. Neither sold any goods or services to the other and Kresge did not dictate Hempfield's source of supply.

The record reveals the major supplier of Hempfield's groceries was a Pennsylvania wholesaler, Fox Grocery Company, a large local grocery outlet, which was located in the area of both Hempfield stores. Plaintiff alleges that it also received a substantial quantity of goods via direct shipment from out of state suppliers which amounted to in excess of $400,000.00 per year at cost. However, it appears that the bankrupt's records are incomplete in many respects. The parties have been unable to determine exactly what volume of purchases Hempfield made from out of state sources, from whom such purchases were made and whether the goods were actually shipped in from out of state or merely billed from out of state addresses.

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It appears that the total retail volume of both Hempfield stores was in the vicinity of four million dollars per year,[4] almost all of which came from the sale of groceries although both stores sold the usual non-food items customarily found in grocery stores, e.g., health and beauty aids.[5]

It is undisputed that Hempfield's sales all occurred in the communities where its two stores were located.

The essence of the complaint is that defendant, through various provisions of the license agreements and the rules and regulations which supplemented those agreements, unlawfully sought to regulate certain aspects of Hempfield's business in violation of Section 1 of the Sherman Act. It is not necessary to set forth the various provisions of the license agreements in detail. In substance, they required, *inter alia*, that Hempfield (1) charge prices identical to those charged by Kresge on "like items," i.e., items sold by both the food stores and the department stores which prices were established by defendant in the event the parties were unable to arrive at a mutually agreeable price; maintain merchandise "competitive"[6] in price with the same or similar

[4]The annual gross sales of both Hempfield stores were approximately as follows:

Year	*Gross Sales*
1964	$2,967,796.00
1965	4,620,727.00
1966	4,050,416.00
1967	4,183,012.00
1968	4,369,971.00

See Supplemental Affidavit of Anthony C. Polito.

[5]For a complete list of the categories of merchandise sold by both the Hempfield stores and the Kresge department stores, see Defendant's Interrogatories to Plaintiff (First Set), question 7.

[6]Plaintiff contends that, as interpreted by defendant, being "competitive" in price meant meeting the lowest price of all its competitors on *(continued)*

goods offered for sale in the trading area; (3) limit non-food merchandise offered for sale to specific categories of goods; (4) refrain from entering into fair trade agreements; (5) refrain from issuing trading stamps without express permission from Kresge; and (6) use certain equipment furnished by defendant at Food Store 4064 (Count II).

Plaintiff alleges that the above listed restraints "contributed to Hempfield's business failure." In plaintiff's view, the first of the above mentioned restraints resulted in a horizontal price-fixing arrangement which is a per se violation of §1; alleged restraints 2 through 5 interfered with Hempfield's ability to exercise its independent business judgment; and alleged restraint 6 was an unlawful tying agreement.

Defendant denies that any or all of the practices complained of violated the Sherman Act. Furthermore, it denies that any of the alleged restraints contributed to Hempfield's business failure which it attributes to bad management, insufficient capitalization and excessive debt structure.

From time to time, Kresge sent employees to inspect both stores for compliance with the terms of the license agreements and the rules and regulations. Plaintiff refers to these periodic check-ups as "policing" since, if violations of

each and every item which Hempfield sold. As explained by counsel for plaintiff at oral argument: Assume Hempfield has three competitors—A, B, and C in the trading area in which it operates, all of whom sell item X and item Y. Competitor A sells item X for $0.49 and item Y for $0.51; competitor B sells both items for $0.50; and competitor C sells item X for $0.51 and item Y for $0.49. Plaintiff states that Hempfield was required to sell both items for $0.49, the lowest price charged by any competitor. Hempfield alleges that this requirement was used to increase the volume of sales at defendant's stores by making Hempfield a "loss leader." See United States v. Food and Grocery Bureau of Southern California, 43 F.Supp. 974 (S.D. Cal. 1942), aff'd, 139 F.2d 973, 974 (9th Cir. 1943).

the license agreements were found to exist, defendant, in effect, issued citations. It appears that as a result of such inspections, Hempfield was directed on several occasions to remove certain unauthorized merchandise or to discontinue its sale when the stock on hand was exhausted.[7] The record also indicates that comparative price checks were made on grocery items to see if they were competitive with other supermarkets in the area.[8] Defendant also prepared and issued Identical Pricing Books which were designed to insure that "like items" were sold at identical prices.

In response to defendant's interrogatories, plaintiff has indicated that Hempfield priced its merchandise using the following guidelines as to like items:

> Merchandise sold in common by both defendant and the Bankrupt was sold at prices dictated by defendant, except during the approximate periods from March, 1965 to October, 1965 and from October, 1968 to March, 1969. During those periods, such merchandise was sold at prices determined in accordance with the Fox Grocery Company gross profit pricing structure designed to produce an overall budgeted gross profit figure of approximately 17.9% to 18.5%.[9]

For merchandise not sold in common:

> The Bankrupt attempted to sell merchandise not sold in common at prices determined in accordance with the Fox Grocery Company gross profit pricing structure designed to produce an overall budgeted gross profit figure of approximately 17.9% to 18.5% as follows:

[7] See Exhibits 3G and 3H, attached to plaintiff's motion for summary judgment and response in opposition to defendant's motion for summary judgment.

[8] See Exhibits 3H, 3J and 3K attached to plaintiff's motion.

[9] See Defendant's Interrogatories to Plaintiff (First Set), question 9.

> 1965 and 1966: 17.9% at both stores
>
> 1967: 18.5% at both stores
>
> 1968, Jan. to Oct.: 18.5% at both stores
>
> Oct. 1968 to Mar. 1969: 18.1% at Food Store 4064 and 18.5% at Food Store 4032.
>
> At various times throughout the entire period, however, the Bankrupt was required to sell merchandise at prices lower than the prices determined as above.[10]

From the inception of this law suit, Kresge has accepted as true most of plaintiff's allegations regarding pricing requirements, purchasing restrictions and the other requirements contained in the license agreements. However, defendant differs drastically with plaintiff on what legal conclusions are to be drawn from the facts.

With this background, we will proceed to examine the issues presented by the motions before us.

I

Discussion of the Jurisdictional Issue

[1, 2] Although substantive and jurisdictional issues are sometimes confusingly described in terms of the "effect" of particular conduct upon commerce as if a common question were presented, see e.g., Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 739-740, n. 3. (9th Cir. 1954), cert. denied, 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645, the substance of the two inquiries is not properly the same. Ford Wholesale Co. v. Fibreboard Paper Products Co., 344 F. Supp. 1323 (N.D. Cal. 1972), aff'd, 493 F.2d 1204 (9th Cir. 1974), cert. denied, 419 U.S. 876, 95 S.Ct. 138, 42 L.Ed.2d

[10] *Id.*, question 14.

115. Whether a defendant's conduct constitutes a substantive violation of the Sherman Act is entirely a matter of congressional definition: Is the defendant's conduct of the type which Congress sought to prohibit, i.e., is that conduct a "restraint of trade" within section 1? The jurisdictional question on the other hand concerns the power of Congress to reach the defendant's conduct: Does the defendant's conduct have a sufficient relationship with interstate commerce so as to be a proper subject of federal regulation? See Rasmussen v. American Dairy Ass'n, 472 F.2d 517 (9th Cir. 1973), cert. denied, 412 U.S. 950, 93 S.Ct. 3014, 37 L.Ed.2d 1003; Gough v. Rossmoor Corp., 487 F.2d 373, 375-376 (9th Cir. 1973).

In the Shreveport Rate Cases, (Houston, E. & Texas Ry. v. United States) 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914), the Supreme Court decided that wholly intrastate activities were properly subject to regulation under the federal commerce power if, despite their local character, they had an economic impact on interstate commerce. In *Shreveport* the Court upheld the power of the federal government to regulate the railroad rates of an admittedly intrastate character and fixed by the authority of the state because of the interstate affects which such rates had.

The *Shreveport* holding has gradually been extended to general application, thereby obviating the need to search for some sharp point or line where interstate commerce ends and intrastate commerce begins in order to determine whether the Sherman Act applies. For the essence of the affectation doctrine was that the exact location of the line made no difference if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defect of Congressional policy regarding it. Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 232, 68 S.Ct. 996, 92 L.Ed. 1328 (1948).

[3] It is now clear that the federal commerce power is as broad as the need that evokes it and encompasses not only the regulation of interstate commerce itself, but all measures necessary and proper to that end including purely intrastate activities, if necessary, to protect and foster interstate commerce. Rasmussen v. American Dairy Ass'n, supra, at 522. As stated by the Supreme Court in United States v. Women's Sportswear Manufacturing Ass'n, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805 (1949):

> "... The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

[4] However, realizing that every enterprise, however localized, has some effect, however remote, on the flow of commerce among the states, the courts have recognized that some "localness," "remoteness" or "de minimus" factor must intervene or federal commerce power under the Sherman Act is boundless. Rasmussen v. American Dairy Ass'n, supra, at 526. Thus, in order for the interstate commerce allegations of a Sherman Act complaint to be jurisdictionally sound, they must allege either activities that are in the flow of interstate commerce or activities which though occurring on a purely local level, substantially affect interstate commerce. Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48, 50 (3rd Cir. 1973). See also Page v. Work, 290 F.2d 323 (9th Cir. 1961), cert. denied, 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76. Thus, restraints which only affect interstate commerce in some insignificant degree or attenuated sense are not within the federal commerce power.

[5] In similar fashion the courts in dealing with the substantive allegations of Sherman Act complaints have recognized that were §1 to be read in the narrowest possible way, any commercial contract would be deemed to violate it. Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918). Therefore, the courts have adopted the so-called "rule of reason" to determine whether most business combinations or contracts violate the provisions of the Act. See Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). An analysis of the reasonableness of a particular restraint includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint, its effects, its history and the reason for its adoption. Chicago Board of Trade v. United States, supra, 246 U.S. at 238, 38 S.Ct. 242.

[6, 7] However, there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable, and therefore illegal, without elaborate inquiry as to the precise harm which they have caused or the business excuse for their use. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 15, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). *Cf.* Klor's v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). These are referred to as per se violations. If a practice is held to be a per se violation the motives of the participants, the means of establishing the per se violation, the extent of the participants' market control, the effect of the agreement on prices and the amount of commerce affected are not relevant. United States v. McKesson & Robbins, 351 U.S. 305, 309-310, 76 S.Ct. 937, 100 L.Ed. 1209 (1956).

[8-10] It is important to distinguish between the substantive requirements of the Sherman Act and its jurisdictional requirements. The per se doctrine only

establishes the unreasonable nature of the restraint; it does not establish that the restraint has substantial interstate impact. See Uniform Oil Co. v. Phillips Petroleum Co., 400 F.2d 267 (9th Cir. 1968). We believe that the jurisdictional question requires independent examination since it is only when we find that interstate commerce is involved or affected that we reach the question of whether a substantive violation has occurred. The reasonableness *vel non* of the restraint is not relevant for jurisdictional purposes since even a per se violation may have no impact on interstate commerce or an impact so insignificant as to be beyond the federal commerce power. *Cf.* Page v. Work, *supra*, at 331-332. Therefore, in considering our jurisdiction we assume, but expressly do not decide, that the conduct complained of constitutes a substantive violation of the Sherman Act. Our sole inquiry is whether the prohibition of that conduct falls within the utmost extent of Congress' constitutional power.

Inherent in any attempt to formulate a general test of Sherman Act jurisdiction is the danger that the test will only further muddy the already murky waters. The formulations are, of necessity, so broad and generalized that instead of providing a guide to the solution of the problem they do no more than restate the issue. Doctors, Inc. v. Blue Cross of Greater Philadelphia, *supra*, at 51.

[11, 12] In laying the groundwork for a workable approach to the problem of Sherman Act jurisdiction one must distinguish between the two theories of jurisdiction, commonly referred to as the "in commerce" theory and the "affecting commerce" theory. If an alleged restraint occurs within the flow of interstate commerce, that is "in commerce," substantial effect on that commerce is presumed as a matter of law and no showing need be made that any particular amount of commerce has been affected. On the other hand, when dealing with restraints which are alleged

merely to have affected interstate commerce, that effect must be substantial in order to justify federal regulation.

While there is language in many cases which indicates that a restraint must have a greater effect upon interstate commerce if it is applied "indirectly" rather than "directly,"[11] see e.g., Page v. Work, *supra*, at 332; Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D.Hawaii 1964); Spears Free Clinic and Hospital v. Cleere, 197 F.2d 125 (10th Cir. 1952), that distinction has been abandoned. In Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942) the Supreme Court said:

> ". . . [e]ven if . . . [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'." 317 U.S. at 125, 63 S.Ct. at 89.

See Doctors, Inc. v. Blue Cross of Greater Philadelphia, *supra*, at 51.

[13] Nor is the traditional inquiry by many courts into the time of the imposition of the restraint any longer necessary since if commerce is found to have been affected, the fact that the restraint was imposed before, after or during the flow of interstate commerce, is immaterial. As stated by the Court in *Doctors:*

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[11] Direct restraints are restraints imposed upon goods or services in the flow of interstate commerce and under the in commerce theory, substantial effect is presumed as a matter of law. Indirect restraints are those imposed on business or goods which merely compete with goods that flow in interstate commerce. See 1 Von Kalinowski, Antitrust Laws and Trade Regulations, ¶5.01(2) and cases cited therein (hereinafter referred to as Von Kalinowski).

> ". . . the Court in each case ends its inquiry when it has satisfied itself that the logical and therefore probable affect of the alleged act is to reduce the flow of goods in interstate commerce." 490 F.2d, at 53.

[14] While Congress had determined its own criteria of substantive violations, it has left to the courts the task of deciding whether particular activities affect interstate commerce. *Cf.* United States v. Darby, 312 U.S. 100, 120, 61 S.Ct. 451, 85 L.Ed. 609 (1941). The concept of interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. Therefore, the courts have eschewed the use of abstract mechanistic formulae in determining whether a particular course of conduct substantially affects interstate commerce. See, e. g., Doctors, Inc. v. Blue Cross of Greater Philadelphia, *supra*, at 51, and Rasmussen v. American Dairy Ass'n, *supra*, at 526, where the Court said:

> "[16] There is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts. . . ."

Since we are dealing with matters of degree and the real world business nature of the Sherman Act's purposes permits of no easy solution, we are instructed to make a particularized judicial determination. See United States v. Yellow Cab Co., 332 U.S. 218, 231, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947). Precedent in this area is unlikely to dictate the outcome in any given case. Rather, it is more likely to communicate a general sense as to how much of an impact local activities must have before the court will assume jurisdiction. Doctors, Inc. v. Blue Cross of Greater Philadelphia, *supra*, at 51.

In summary, we agree completely with the directive in Rasmussen v. American Dairy Ass'n, *supra*, where the Court said:

> "[9] In essence the test is whether '[t]he facts of the particular situation . . . determine . . . [that the] relationship to interstate commerce is too tenuous in a practical sense to warrant federal control.'" (Citation omitted). 472 F.2d, at 524.

II

Can the Court Decide Jurisdiction on a Motion for Summary Judgment?

Before turning to jurisdiction, we are confronted at the outset by two contentions raised by plaintiff which concern the power of the court to decide the jurisdictional issue on a motion for summary judgment. First, plaintiff contends that the "jurisdictional" issue and certain issues on the merits are so closely related that the court should reserve determination of the jurisdictional issue until trial on the merits. Secondly, plaintiff submits that the jurisdictional issue must be left for determination by a jury.

[15] In a memorandum opinion deciding discovery disputes, dated February 27, 1974, in denying defendant's motion for an evidentiary hearing on the issue of subject matter jurisdiction, we said:

> "The motion for an evidentiary hearing filed by defendant is also denied. When discovery is complete and the facts are available, defendant may, if he desires to do so, file a motion for summary judgment. We agree that the court may dispose of the question of jurisdiction as well as other questions on a motion for summary judgment. . . ."

We now reaffirm our earlier decision and hold that the court may decide the jurisdictional issue on a motion for summary judgment.

In support of his past argument, plaintiff relies on McBeath v. Inter-American Citizens for Decency Committee, 374 F.2d 359 (5th Cir. 1967), cert. denied, 389 U.S. 896, 88 S.Ct. 216, 19 L.Ed. 2d 214 (1967). The district court in *McBeath* dismissed a Sherman Act claim holding that plaintiff had failed to show that the conduct complained of had the requisite impact on interstate commerce. In reversing, the appeals court, explicitly relying on Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947),[12] held that the issue of the effects of the conduct complained of on interstate commerce was so intertwined with the merits of the case that it was error for the district court to dismiss the suit without giving plaintiff a full chance to prove his case on the merits.[13]

[12]In Land v. Dollar, *supra*, the complaint alleged that members of the U.S. Maritime Commission were unlawfully holding shares of Dollar stock under a claim that the stock belonged to the United States. The district court dismissed the action on the ground that the United States was immune from suit. In affirming a reversal of that dismissal, the Supreme Court said:

> "[A]lthough as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits." 330 U.S., at 735, 67 S.Ct., at 1011.

The court reasoned that since if the plaintiffs were to prevail on either of their theories on the merits, i. e., that the Commission was without authority to acquire the shares or that the contract was simply a pledge of the shares rather than an outright transfer then they would also prevail on the jurisdictional issue. See Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 196, n. 10, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974) (Douglas, J., dissenting).

[13]The *McBeath* court distinguished Page v. Work, *supra*, where the use of the summary judgment procedure was upheld because the court

(continued)

We do not believe that the case before us falls within the holding of Land v. Dollar, n. 12, *supra*, since even if the provisions of the license agreements complained of were held to constitute Sherman Act violations, per se or otherwise, plaintiff must still show that the violations either occurred in the flow of commerce or affected it. Furthermore, we believe that unlike the *McBeath* situation, we have abundant evidence before us on which to base our determination.

[16] We also hold that the jurisdictional question is best suited to trial by the court and, therefore, need not be submitted to the jury.

[17] While there are instances in which courts have treated the questions of whether the alleged violation occurred in or affected interstate commerce as jury questions, see e. g., United States v. Pennsylvania Refuse Removal Ass'n, 357 F.2d 806 (3rd Cir. 1966), cert. denied, 384 U.S. 961, 86 S.Ct. 1588, 16 L.Ed.2d 674 (1966); Las Vegas Merchant Plumbers Ass'n v. United States, *supra*, we believe that in this case the best approach is to treat the question of jurisdiction as triable to the court if reasonably separable from the substantive allegations. The difference is this: If coverage is treated as substantive for purposes of mode of trial, the issue of whether a cause of action is stated must be left to the jury in cases in which the underlying facts are not in dispute, but different inferences may be drawn from them. Thus, on the same business arrangements, one case may be decided one way and another in a different way as the jury may find the arrangements did or did not affect commerce. We believe that the better approach is to treat

there had abundant evidence before it on which to base its decision. Thus it appears the *McBeath* decision was premised on the fact that the district court lacked a sufficiently complete record on which to base its determination of jurisdiction.

the reach of the Sherman Act as a matter of law so that the perimeter of the statute can be worked out in the appellate courts. 5 Moore's Federal Practice, ¶38, 36 [2.-2], at 300.

[18] The existence of an important, difficult or complicated question of law, where there is no genuine issue of material fact, is not a bar to summary judgment. 6 Moore's Federal Practice, ¶56.-16 at 2447. We are aware of the admonition that summary procedures should be used sparingly in complex antitrust cases, Poller v. Columbia Broadcasting, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). We find, however, that this case is not of the type where summary judgment is inappropriate.

In such cases as United States v. Employing Plasterers' Ass'n, 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954), Mandeville Island Farms v. American Crystal Sugar Co., *supra*, and United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), the Supreme Court has reviewed interstate commerce issues in the context of dismissals of antitrust suits prior to trial on the merits. These dismissals, however, were not based on motions for summary judgment but rather on motions to dismiss for failure to state a claim under Rule 12, F.R.Civ.P. See Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 196, n. 10, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974). Other courts have treated motions for summary judgment as motions to dismiss. See e.g., A. Cherney Disposal Co. v. Chicago and Suburban Refuse Disposal Ass'n, 484 F. 2d 751, 753 (7th Cir. 1973), cert. denied, 414 U.S. 1131, 94 S.Ct. 870, 38 L.Ed.2d 755; Deaktor v. Fox Grocery Co., 332 F.Supp. 536 (W.D. Pa. 1971), aff'd 475 F.2d 1112 (3rd Cir. 1973), cert. denied, 414 U.S. 867, 94 S. Ct. 65, 38 L.Ed.2d 86.

[19] Summary judgment procedures have been used to resolve jurisidctional issues. See e. g., Page v. Work, *supra*,

and Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964), and we find that the challenge to the court's jurisdiction may be decided on defendant's motion since it is a legal issue and the record before the court is adequate to decide it.

III.

Decision on the Jurisdictional Issue

> ". . . [T]he inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, ***except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.*** (Footnote omitted). For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, ***and a showing of actual or threatened effect upon interstate commerce,*** the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence." Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 234, 68 S.Ct. 996, 1005, 92 L.Ed. 1328 (1947) (Emphasis added).

Defendant's motion for summary judgment is premised upon the argument that this case involves a situation in which no aspect of substantial effect• on interstate commerce can be shown in the sum of the facts presented, there having been no showing of an actual or threatened effect upon interstate commerce.

•The words "effect" and "affect" are frequently used interchangeably.

Plaintiff contends that the court has jurisdiction over the subject matter of this action under both theories of federal commerce power enunciated in Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48 (3rd Cir. 1973), that is, that defendant's conduct occurred in the flow of interstate commerce (in commerce) or that if found to have occurred on a purely local level, that such conduct affected interstate commerce so as to bring this action within the expansive purview of §1.

Upon careful review of the entire record, the briefs of both parties and the authorities cited therein, we conclude that the activities complained of did not occur in the flow of interstate commerce nor did they substantially affect it.

A. *In Commerce Theory*

[20] The two theories upon which the existence of interstate commerce can be predicated differ in one important respect: where the transaction occurs in the flow of commerce, there is no necessity of showing that it affects interstate commerce, Mandeville Island Farms v. American Crystal Sugar Co., *supra*, but where the transaction is not in the flow of commerce, and only affects interstate commerce, plaintiff is required to establish a nexus between the restraint and the flow of commerce. Despite language in some cases indicating otherwise, it is not necessary for jurisdictional purposes that plaintiff demonstrate an adverse effect; all that need be shown is a substantial effect. See 1 Von Kalinowski, ¶ 5.01[1], at 5-7, 5-8, n. 8.

Plaintiff contends that the restraints herein alleged are per se violative of the Sherman Act inasmuch as they fixed prices and interfered with Hempfield's ability to exercise its independent judgment. Therefore, plaintiff argues that the requisite showing of the necessary effect on interstate commerce has been made. Plaintiff relies on United States v.

Columbia Steel Co., 334 U.S. 495, 522, 68 S.Ct. 1107, 1121, 92 L.Ed. 1533 (1948), in which the Supreme Court held that "...where a complaint charges that defendants have engaged in price fixing...then the amount of commerce involved is immaterial because such restraints are illegal per se." *Cf.* Yellow Cab Company of Nevada v. Cab Employers, Automotive and Warehousemen, Local No. 881, 457 F.2d 1032, 1034 (9th Cir. 1972).

[21] Plaintiff's argument cannot withstand close scrutiny. In attempting to invoke the per se doctrine before any showing has been made of an effect upon interstate commerce, plaintiff is, in effect, putting the cart before the horse. Given an in commerce context for the alleged per se violations, we would agree with plaintiff. See United States v. Richter Concrete Corp., 328 F. Supp. 1061 (S.D. Ohio 1971). But that showing must precede application of the per se doctrine. It does not follow from it. The crucial nature of the distinction was explained in Las Vegas Merchant Plumbers Ass'n v. United States, supra.[14]

> "...True, a price fixing conspiracy which operates on or within the flow of interstate commerce affects that commerce as a matter of law. But a price fixing conspiracy at a purely local or intrastate level does not, as a matter of law, affect the flow of commerce.

[14]In *Las Vegas Merchant Plumbers, supra,* government counsel argued that it was plainly not for the jury to decide whether a per se violation has the necessary effect upon commerce; that price fixing at any level necessarily affects interstate commerce as a matter of law and that the law conclusively presumes such an effect. The Ninth Circuit answered this argument: "Assuming an 'in commerce' situation, we can agree. But when the 'affect' on commerce theory is presented, it is clearly a question of fact whether wholly intrastate activities affect interstate commerce in a manner proscribed by the Sherman Act. After this question is decided, then the per se doctrine may well apply." 210 F.2d at 748. See also United States v. Richter Concrete Corp., *supra.*

> Whether a purely local or intrastate conspiracy unreasonably restrains interstate commerce is primarily a factual question, i.e., does the local price fixing conspiracy affect substantially the flow of interstate commerce? If the answer is yes, then only are we concerned with the effect of the price-fixing under the per se doctrine. In fact, unless there is a finding that the local and intrastate activities complained of and as alleged...substantially affected interstate commerce, there is no jurisdiction in a district court over the alleged Sherman Act violation...." 210 F.2d, at 747.

[22] Plaintiff seems to argue that since the restraints are alleged to be per se violations of §1 they are subject to a less rigorous jurisdictional test than other restraints. That argument is without merit. The jurisdictional test is the same. See Mandeville Island Farms v. American Crystal Sugar Co., *supra;* Savon Gas Stations No. Six, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir. 1962), cert. denied, 372 U.S. 911, 83 S.Ct. 725, 9 L.Ed.2d 719.

In Page v. Work, supra, the publisher of a local newspaper which printed only legal advertisements argued that a trade association of local newspapers had monopolized the market for legal advertisements. Among his claims the publisher alleged that the trade association had engaged in price fixing and horizontal market divisions, and that since such restraints were illegal per se under §1 of the Sherman Act, there could be no issue with respect to jurisdiction. The court rejected the plaintiff's contention, noting that for purposes of jurisdiction, there must be an effect upon interstate commerce, and that because a restraint is of an unreasonable nature it does not follow that it must affect interstate commerce. See United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 297, 65 S.Ct. 661, 89 L.Ed. 951 (1945).

In short, plaintiff cannot avoid the burden of showing an impact on interstate commerce merely by alleging that the conduct complained of constitutes a per se violation of the Sherman Act. Therefore, consideration of the nature of the alleged violation is premature until we have determined whether that conduct either occurred in or affected interstate commerce.

In support of its argument that the conduct complained of occurred in the flow of commerce, plaintiff relies on the following facts. Defendant's employees at its home offices in Michigan devised and adopted the restraints and incorporated them into the license agreements which they drafted. The policies applied not only to the two stores directly in question but to all of defendant's supermarket licensees throughout the United States as well. The particular agreements involved in this case were finally executed in Detroit by defendant and transmitted to Hempfield.

Furthermore, plaintiff alleges that from 1964 through 1968, Hempfield sold a total of over $20 million in merchandise which was subjected to the restraints, of which approximately eighty percent was manufactured outside of Pennsylvania and shipped into the state in interstate commerce. Of these goods, plaintiff asserts that in each year, more than $400,000 worth were shipped directly to Hempfield in interstate commerce from sources outside of Pennsylvania.

[23] Although defendant contests the volume of plaintiff's interstate transactions[15] we will deal with the

[15]Plaintiff's allegation that Hempfield made $400,000 worth of annual purchases in interstate commerce by direct shipments from out of state suppliers is challenged by defendant on several grounds: first, Anthony C. *(continued)*

alleged facts in the light most favorable to plaintiff as we must upon a motion for summary judgment.[16]

[24] In our view, the facts concerning the place of execution, the drafting of the agreements, and the interstate nature of both parties' business do not lend any support to plaintiff's argument that commerce has been affected as a matter of law.

> "... The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." Page v. Work, *supra*, 290 F.2d. at 330.

Thus, our jurisdictional inquiry is limited to ascertaining whether the alleged §1 violations occurred in or affected interstate commerce.

Plaintiff relies on Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc., 371 F. Supp. 701 (S.D. N.Y. 1974) aff'd, 493 F.2d 1352 (2nd Cir. 1974), Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir. 1962), cert. denied, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99, United States v. Erie County Malt Beverage Distributors Ass'n, 264 F.2d 731 (3rd Cir. 1959) and United

Polito, the sole shareholder of Hempfield, in his deposition, admitted that he had no data available to support that figure (See excerpts from Polito deposition, attached as tab 3b to Kresge's first motion for summary judgment). While Polito in a Supplemental Affidavit, purports to document that figure, defendant claims that an investigation of Hempfield's creditors with out of state addresses discloses that an overwhelming majority shipped merchandise to plaintiff from distribution centers which they maintained in Pennsylvania. (See Richmond Affidavit, tab 6, to defendant's earlier motion for summary judgment).

[16]The allegations in the complaint are to be taken as true on motion for summary judgment except as they may be contradicted by stipulated fact, affidavit or other material properly submitted to the court. *Cf.* Hiern v. St. Paul-Mercury Indemnity Co., 262 F.2d 526, 529 (5th Cir. 1959).

States v. Food and Grocery Bureau of Southern California, *supra*, n. 6, in his attempt to establish that the conduct complained of here occurred in the flow of interstate commerce.

Defendant, citing C. S. Smith Metropolitan Market v. Food & Grocery Bureau of Southern California, 33 F. Supp. 539 (S.D. Cal. 1939); Cliff Food Stores v. Kroger, 417 F.2d 203 (5th Cir. 1969); Brosious v. Pepsi-Cola Co., 155 F.2d 99 (3rd Cir. 1946); Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 395 F.2d 420 (3rd Cir. 1968) cert. denied, 410 U.S. 913, 93 S.Ct. 966, 35 L.Ed.2d 278, Savon Gas Stations No. Six v. Shell Oil Co., *supra*, and St. Anthony-Minneapolis v. Red Owl Stores, 316 F. Supp. 1045 (D. Minn. 1970), argues that the in commerce theory cannot apply to the case at bar.

In short, defendant argues that even if the goods subject to the restraints had at one time been in the flow of commerce, they ceased to be in commerce when they reached the shelves of plaintiff's stores. Accordingly, defendant contends that the subsequent sale of such goods to retail customers was a purely intrastate transaction.

Plaintiff argues that the flow of commerce did not terminate when the goods came to rest on its shelves, but rather that the retail sale of groceries by its very nature, contemplates a continuity of movement from the supplier to the ultimate consumer and that, therefore, the goods subjected to the alleged restraints remained in commerce.

[25, 26] We have already indicated that it is not always easy to determine where interstate commerce ends and intrastate commerce begins. Furthermore, if the conduct affects interstate commerce, inquiry as to whether it occurred locally or in commerce is unnecessary. See United States v. Women's Sportswear Manufacturing Ass'n, *supra;* U.S. v. Employing Plasterers' Association, 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954). However, since, if the conduct occurred in the flow of commerce, there is a conclusive presumption of an affect on that commerce, for jurisdictional purposes, we must determine whether the conduct alleged occurred in commerce as plaintiff contends.

For purposes of delimiting the respective spheres of intrastate and interstate activities, a concept has developed relating to the movement of commodities between the states which says that interstate activities end when the commodities come to rest within the state. United States v. Food and Grocery Bureau of Southern California, 43 F. Supp. 966, 977 (S.D. Cal. 1942). See e.g., C. S. Smith Metropolitan Market v. Food & Grocery Bureau of Southern California, *supra;* see also Cliff Food Stores v. Kroger, *supra*, at 210, a case under the Robinson-Patman Act, 15 U.S.C.A. §13, where the court said:

> "The sales complained of in the instant case were intrastate in nature. When food products are delivered to the retail grocer, title thereto passes to him. Even though many of the products are derived from out of state, the merchant's sales to the general public are not in the flow of commerce because the moment the products reach his shelves 'they come to rest and cease to be "in the flow" of interstate commerce.' " (Citations omitted.[1]

Plaintiff contends that the "come to rest" doctrine has itself been laid to rest by the holding of subsequent cases and cites United States v. Food and Grocery Bureau of Southern California, *supra;* Northern California Pharmaceutical Ass'n v. United States, *supra;* United States v. Erie County Malt Beverage Distributors Ass'n, *supra*, and Harlem River Consumers Coop, Inc. v. Associated Grocers of Harlem, *supra*, in support of its argument.

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[1]See opinion of March 14, 1972.

In United States v. Food and Grocery Bureau of Southern California, *supra*, the court states that the widest application of the come to rest doctrine has been in cases "...upholding the regulatory powers, especially the taxing power, of a state over goods in transit during their stay in the state." 43 F. Supp. at 977.

> "...But the courts have warned us not to accept the concession which the federal government is thus willing to make to state sovereignty in matters of this character in a dogmatic sense. Specifically have they warned us that these cases do not delimit the extent of federal control over interstate commerce." (Citations omitted) Id.

[27, 28] While we recognize the limited use of the come to rest doctrine, we believe it has continued viability in Sherman Act cases to determine whether the acts complained of occurred in interstate commerce, *Cf.* Rasmussen v. American Dairy Ass'n, *supra*, at 526. We use it here for that limited purpose. We hold that the retail sale of groceries to the general public are transactions consummated locally, involving commodities of a local character having been previously diverted from the flow of commerce. We hasten to add, however, that this holding does not preclude jurisdiction if the restraints affected interstate commerce.

We believe that this is consistent with the logic of United States v. Food and Grocery Bureau of Southern California, *supra*,:

> "In assaying price-fixing agreements, the test is not so much whether the effect is felt after the movement of goods has reached the end of the interstate journey. The inquiry seeks the effect upon prices in the market and *if this effect be shown*, it matters not that the movement has come to a halt within the state...." 43 F. Supp. at 977. (Emphasis added).

[29] While there are instances in which goods shipped into a state are properly considered to remain within the flow of commerce,[18] the base at bar is not among them.

B. The Affecting Commerce Theory

[30] When the transaction complained of is not in the flow of commerce, there may be difficulty in establishing the nexus between the restraint and the flow of interstate commerce. Accordingly, the plaintiff in a Sherman Act case has a much greater burden of establishing the requisite impact on commerce resulting from the conduct complained of if the effect theory is being relied on. 1 Von Kalinowski, ¶5.01(2), at 5-23.

As we have previously indicated, the time the restraint is imposed and the nature of the restraint, i.e., direct or indirect, are of no consequence if there is a substantial effect on interstate commerce. The question here then is whether plaintiff has shown any substantial effect, either real or threatened, on interstate commerce resulting from the conduct complained of.

[31] Congressional power is not over persons but over practices and it is irrelevant that a person is in some way

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[18] The following are instances where goods brought from without the state are considered to remain within the flow of interstate commerce: (1) where the shipment is made in anticipation of needs of specific customers rather than on prior orders or contracts and there is, therefore, a practical continuity in transit necessary to keep a movement of goods "in commerce." See United States v. Richter Concrete Corporation, *supra*,; (2) where the goods are purchased by the retailer from the supplier to meet the needs of specified customers pursuant to some understanding with the customer, although not for immediate delivery; and (3) where the goods are purchased by the retailer based upon the anticipated needs of specified customers. See Walker Oil Co. v. Hudson Oil Co. of Missouri, 414 F.2d 588 (5th Cir. 1969); Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1945). See also Country Maid v. Haseotes, 324 F.Supp. 875 (E.D. Pa. 1971).

engaged in interstate commerce if the practice complained of is in no way related to that commerce. *Cf.* Yellow Cab Co. of Nevada v. Cab Employers, Automotive & Warehousemen, Local No. 881 *supra*. See Page v. Work, *supra*, at 329; Savon Gas Stations No. Six v. Shell Oil Co., *supra*. See also United States v. Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970) and United States v. Yellow Cab Co., *supra*, where the Supreme Court held that there was Sherman Act jurisdiction over that portion of a complaint which alleged that the defendant cab company had attempted to monopolize the carrying of passengers between two interstate railroad terminals in Chicago, but held that there was no jurisdiction over the allegations that the same company had violated the Act in its intracity carriage.

Kresge argues that the entire thrust of plaintiff's complaint is that the defendant interfered with the retail sales practices of Hempfield's two supermarkets. Assuming arguendo that this is true, defendant asserts that plaintiff has failed to show any effect on Hempfield's interstate commerce, let alone a substantial effect. In support of this argument Kresge relies on the following facts:

(1) Kresge did not sell any goods to Hempfield;

(2) Kresge did not dictate or restrict Hempfield's sources of supply;

(3) Kresge did not in any way control or attempt to control the price Hempfield paid for its merchandise; and

(4) Kresge did not in any way affect any other retail outlet competing with Hempfield.

[32] Therefore, defendant argues that the mere fact that Hempfield made purchases in interstate commerce is irrelevant because Hempfield has failed to make the necessary showing of a substantial effect on those purchases

resulting from the conduct complained of. Defendant also contends that Hempfield has such a miniscule part[19] of the intrastate food sales market that any possible impact of the alleged restraints was merely incidental to local activity and insufficient to confer Sherman Act jurisdiction upon the court.

[33] After a careful and thorough examination of the record we conclude that the plaintiff has failed to make the required showing of a substantial impact on interstate commerce resulting from the conduct of defendant either qualitatively or quantitatively.[20] Therefore, we believe it proper to grant Kresge's motion for summary judgment.

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[19]In support of its argument that Hempfield's share of the local retail market was miniscule, defendant submitted an Affidavit of James F. Stangl, a Research Analyst and Client Service Representative employed by Management Science Associates, Inc. (Tab 5 to Kresge Motion for Summary Judgment). Stangl conducted an on-site survey of retail outlets within a 5-mile radius of the two stores to make a competitive profile of the markets in which the two K-Mart Food Stores operated by Hempfield were involved. The results of the survey indicate that Food Store 4032 had 17 competitors in the supermarket business, that there were 26 "Mom and Pop" convenience grocery stores, 2 delicatessens, 3 drug stores and 4 mass merchandise stores within a five mile radius. (See Exhibit A to Stangl Affidavit). For Food Store 4064, there were 29 supermarket competitors, 7 "Mom and Pop" convenience grocery stores, 8 delicatessens, 5 drugs stores and 14 mass merchandise stores (Exhibit B to Stangl Affidavit). The Stangl Affidavit also contains various published data on retail food stores. The Stangl findings were interpreted by Alfred A. Kuehn, President of Management Science Associates (see Tab 4 to Defendant's Motion). Defendant, however, has objected to the Kuehn affidavit claiming it is inadmissible hearsay and must be ignored. Finding that the Kuehn affidavit is in the nature of expert testimony, we have not relied upon it. However, we take judicial notice of the highly competitive market in which the Hempfield Stores were located, of which they had in the vicinity of 1% of the market.

[20]Substantial restraints may be viewed either quantitatively or qualitatively. The quantitative approach looks to the proportion of the total volume of the flow of commerce in a line of goods or services which

(continued)

In Page v. Work, *supra*, the shareholders of a corporation (Consolidated) instituted a derivative action against the competitors of the corporation and a competitive bureau. Consolidated published a newspaper in the Los Angeles area concerned primarily with legal advertising. Plaintiffs alleged that the defendants had engaged in a conspiracy and numerous other antitrust violations which caused the dissolution of the corporation in which plaintiffs held stock. While the court found that both the plaintiff corporation and the defendants were involved in interstate commerce by the purchase of newsprint from out of state sources, publication of some national news and sales to out of state subscribers, it determined that the elimination of Consolidated as a competitor would not interfere with the flow of national news or advertising and that the business of legal advertising in the Los Angeles area was wholly intrastate. Accordingly, the court adopted the conclusion of the district court:

> "The interstate trade or commerce in which plaintiff and defendants engage did not suffer any anti-competitive effects from the acts of defendants of which plaintiff complains." 290 F.2d at 329.

Even though the newspapers were subject to federal regulation because of their interstate activities, the court held that it lacked jurisdiction over plaintiff's claim because interstate commerce was not substantially affected by the conduct complained of.

Plaintiff argues that Page v. Work is distinguishable since the court's analysis there centered on the finding that

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is affected by the restraints. Qualitative in substantiality is the standard used to determine whether the restraint is essentially local in nature without such effect as would justify the assumption of federal jurisdiction. See generally, 1 Von Kalinowski, ¶5.01(4), at 5-105.

the relevant product market for monopolization purposes was the purely intrastate legal advertising market within Los Angeles County. Plaintiff contends that because market control is not relevant in price-fixing cases, *Cf.* United States v. McKesson & Robbins, Inc., *supra*, that case does not apply. We believe, however, the *Page* does serve to illuminate the metes and bounds of Sherman Act jurisdiction and here, as in *Page*, participation by either or both parties in interstate commerce does not suffice to confer jurisdiction. That commerce must have been affected.

Plaintiff, in attempting to establish that the amount of commerce affected was not quantitatively insubstantial, argues that the court must consider not only Hempfield's interstate purchases but also those of other Kresge food licensees who were similarly restricted, citing Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48 (3rd Cir. 1973).

[34] *Doctors* was an action by a single hospital against Blue Cross, a hospitalization insurer, and Hospital Survey Committee, Inc. (HSC), a private non-profit corporation which served as an advisory planning agency for the coordination of hospital and health services in the Philadelphia area. In 1972, Blue Cross sought to terminate plaintiff hospital's membership status. In the complaint plaintiff claimed that this action was taken pursuant to a scheme to control the area's hospital services market. Both defendants in *Doctors* filed motions to dismiss, arguing like Kresge does here, that the court lacked jurisdiction of the subject matter of the complaint. Defendants contended that the complaint alleged only restraints in intrastate trade or commerce. Plaintiff on the other hand, as does plaintiff here, claimed that the court had jurisdiction under both theories, that is, that the activities complained of occurred in the flow of interstate commerce, and alternatively, that the activities

substantially affected interstate commerce. The district court granted defendant's motion to dismiss. The Third Circuit reversed and held that the allegations with respect to the affecting commerce theory were sufficient to confer jurisdiction. The court reasoned that while the individual plaintiff purchased only $233,000 worth of supplies from out-of-state sources, the defendant's conduct was directed at all other hospitals in the area:

> ". . . . Moreover, the complaint alleges that Doctors activities are typical of those hospitals supplying hospital and health services throughout the United States. As a result, we must assume that like volume of out-of-state supplies are purchased by the approximately 100 other hospitals located in the Greater Philadelphia area. Since the overall scheme alleged in this complaint is directed at them also, this interstate commerce will be affected as well.
>
> "The key question in the case then is whether these clear 'effects' on interstate commerce, caused by the activities alleged, are 'substantial' enough to confer jurisdiction. . . ." 490 F.2d at 51.

The court concluded that they were. From this, plaintiff argues that the volume of interstate purchases made by other licensees of Kresge must be considered and not merely that of the Hempfield stores. We disagree.

In *Doctors*, the defendant purchased more than 50% of all hospital services sold in Philadelphia. Because of this economic power in the hospital services market Blue Cross has sufficient market control to justify consideration of the effects which its policies would have on not only Doctors but on other hospitals as well. The facts before us are in stark contrast with that situation. Kresge does not even participate in, let alone control, the groceries market in Western Pennsylvania. It is also clear that Kresge couldn't exert any

substantial influence on the overall retail groceries market through its licensees. Therefore, we find that only Hempfield's interstate commerce activities are relevant to the issue of substantial effect on that commerce in this case.

Plaintiff argues that even if only Hempfield's purchases are deemed relevant to the issue of substantial effect on interstate commerce that the purchase of $400,000 worth of goods annually in interstate commerce satisfies the requirement that the effect be substantial, citing Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969).

In our opinion and order of March 14, 1972, we said:

> "The theory of plaintiff appears to be that the alleged price-fixing caused the bankrupt to be unable to continue in business and unable to continue buying goods and thus about $400,000.00 per year of merchandise ceased flowing from interstate commerce into its stores. The plaintiff argues that consequently there was an affect on interstate commerce which *Fortner* has already held to be substantial enough to give us jurisdiction."

In the same opinion we stated that the Polito Affidavits would bring the instant case within the holding in *Fortner*. Since that time, the parties have disputed whether *Fortner* establishes a test for jurisdiction in this case.

In *Fortner*, plaintiff alleged an illegal tying arrangement between the defendant steel company and its wholly owned credit corporation whereby, as a condition to obtaining loans from the credit corporation for the purchase and development of certain land, plaintiff was required to agree to purchase at unreasonably high prices, prefabricated houses manufactured by defendant for erection on the lots purchased with the borrowed money. After concluding that

credit was indistinguishable from other goods and services when used as the "tying product," the Court held that the tying arrangements alleged were per se illegal if defendant had sufficient economic power with respect to the tying product (credit) to appreciably restrain free competition in the market for the tied product (prefabricated housing) and a not insubstantial amount of interstate commerce was affected. The Court remanded the case for trial finding it impossible to conclude on the record presented to it that the credit corporation did not have a competitive advantage in the credit market as a matter of law.

In considering whether a substantial amount of interstate commerce was affected, the Court in *Fortner*, said:

> ". . . . For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit. . . ." 394 U.S. at 502, 89 S.Ct. at 1258.

The Court added that all that is required is enough commerce in terms of dollar volume so as not to be de minimis. Plaintiff contends that $400,000 is not de minimis, and is sufficient as a matter of law to confer jurisdiction.

[35, 36] We believe that plaintiff's reliance on *Fortner* is misplaced. In tying cases, the fact that the sale of the desired product (the tying product) is conditioned upon purchases of some other product (tied product) necessarily means that commerce in the tied product is foreclosed. Therefore, interstate commerce in the tied product is affected. On the other hand, in the case under consideration there has been no showing that the interstate commerce in which Hempfield

engaged, whatever its volume, was affected by the license agreements. To the contrary, Hempfield was free to purchase from whomever it wanted at the best terms available.

Furthermore, when they talk about substantiality of commerce in the *Fortner* case, it is not for the purpose of determining subject matter jurisdiction at all; it is for the purpose of determining the economic power of the manufacturer and his relationship to the ties and to the tying product. Therefore, in determining whether defendant had sufficient economic power in the marketplace, the Court held that the scope of inquiry was not properly limited to the single plaintiff's volume of interstate commerce. The fact that a tie is not unlawful unless there is sufficient economic power over the tying product to effectively require the purchaser to also purchase the tied product necessitated this analysis. Here, on the other hand, we are concerned neither with a sale of goods between the parties nor a tie. Therefore, we believe that *Fortner* does not relieve plaintiff from its burden of showing that the interstate commerce in which it participated was substantially affected by the conduct complained of.

Defendant contends that the elimination of Hempfield as a competitor could not have affected interstate commerce because it would have no substantial effect on interstate commerce, the demand for groceries being "inelastic."[21] Plaintiff argues that defendant's argument runs afoul of the Supreme Court's reading of the Sherman Act as evidenced by Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

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[21] "Inelastic" simply means that the demand for groceries is constant. Therefore, defendant argues that Hempfield's going out of business could not have affected interstate commerce. See Appendix C to defendant's brief.

Plaintiff in *Klor's* was a retail merchandiser who dealt in household appliances. He sued a chain of national department stores (and manufacturers and distributors of appliances in which he dealt) alleging that it had conspired with defendant manufacturers and distributors not to sell to plaintiff or to sell only at discriminatory prices.

The defendants did not deny these allegations but contended that the complaint failed to state a cause of action. Defendants submitted unchallenged affidavits showing that there were hundreds of other retailers in the area who sold many competing brands of appliances including those which defendants refused to sell to Klor's. In reversing the summary judgment granted defendant by the district court, the Supreme Court said:

> "The holding, if correct, means that unless the opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively." 359 U.S. at 210, 79 S.Ct. at 708.

The Court held that the allegations clearly established a group boycott which interfered with the "natural flow" of an appreciable amount of interstate commerce.

> "This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce." 359 U.S. at 213, 79 S.Ct. at 710.

[37] We do not feel that the case at bar fits within the logic of *Klor's*. Contrary to the above quoted passage, the

restraints in the case *sub judice* did not deprive Hempfield of its freedom to purchase in an open, competitive market or drive it out of business as a retailer in its distributor's product. Nor did it deprive the distributors or producers of their freedom to sell to Hempfield under terms determined in a free and competitive market. We find that the conduct complained of did not interfere with whatever interstate business in which Hempfield may have been engaged.

[38] The mere fact there are many other grocers and the market is highly competitive does not preclude jurisdiction. But the fact is, the Court in *Klor's* dealt with the interstate commerce issue in one sentence: "The business of manfacturing, distributing and selling household appliances is in interstate commerce." 359 U.S. at 209, 79 S.Ct. at 708. Having found that the conduct occurred in interstate commerce, the only remaining question was whether the alleged conduct constituted a violation of the Sherman Act.

We have already decided that the *sale* of groceries in a local area is not in interstate commerce. Therefore, plaintiff, in order to establish jurisdiction, must show that the restraints complained of affected interstate commerce.

In United States v. Starlite Drive-In, Inc., 204 F.2d 419 (7th Cir. 1953), defendants who operated drive-in theaters were charged with conspiring to fix admission prices. The District Court dismissed the complaint for failure to allege that interstate commerce was affected. In affirming the dismissal, the Court of Appeals stated:

> ". . . [N]o agreement is asserted between exhibitors (defendants) and either distributors or producers, no agreement which bears any relation to the price paid by the defendant exhibitors for the films—in fact, no agreement relating in any manner or form to the films but only to the price which exhibitors will charge their

> theatre patrons . . . . It is evident that the interstate nature of the dealings between the distributors and the exhibitors . .. is terminated prior to their exhibition. A decision, therefore, simmers down to the narrow question as to whether the price-fixing agreement charged has or could have any appreciable effect upon the flow of films in interstate commerce." 204 F.2d at 420-421.

The court concluded that no such facts were alleged and it was not reasonably discernible how or in what manner the condemned agreement affected commerce.

> "Certainly there is no basis for a claim that the movement of films in interstate commerce was either enhanced or diminished or that any discrimination resulted either to exhibitors in the procurement of films or to their patrons in viewing the films. Distributors were as free to deal with exhibitors, and the latter were as unfettered in the procurement of films as they would have been in the absence of the charged conspiracy. The agreement had nothing to do with the price which the distributor received for its film or the price which exhibitor paid for it. The agreement was between local parties and related solely to a business that was typically intrastate in its nature." *Id.*

We have already discussed the limited value of precedent in cases dealing with the jurisdictional inquiry under the Sherman Act. However, we feel that the reasoning of the court in *Starlite Drive-In* is applicable to the case before us. Hempfield has not alleged that the restraints complained of involved any restrictions on its sources of supply, either in Pennsylvania or from out of state. Furthermore, there is no evidence of any agreement affecting the price which Hempfield was to pay for its supplies. The sole complaint is that the defendant regulated the prices at which Hempfield could sell its merchadise.

We do not believe that any evidence exists which shows or suggests that the interstate commerce in groceries was either enhanced or diminished by the agreement. Nor do we believe that the conduct complained of restricted Hempfield's latitude in dealing with its suppliers. In short, we find that the alleged conduct had nothing to do with whatever interstate commerce Hempfield might have engaged in during the course of its operation of the stores in question. Therefore, we have no jurisdiction.[22]

IV.

Was There a Restraint of Trade?

Although we have decided that the practices complained of neither occurred in nor substantially affected interstate commerce, we believe that the interests of judicial ecomony will be served if we proceed to consider whether the practices under attack were restraints of trade as that term is used in §1. Our reasons are two-fold: (1) both parties agree that there are no issues of material fact precluding summary judgment, and (2) in view of the lengthy delays occasioned by appeals we believe that our consideration of the alleged restraints will expedite final determination of this case.

[39, 40] Section 1 of the Sherman Act has consistently been held to prohibit only those restraints of trade which are "unreasonable."

> "A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se." United States v. Columbia Steel Co., 334 U.S. 495, 522, 68 S.Ct. 1107, 1121, 92 L.Ed. 1533 (1948).

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[22] We have carefully examined each of the other restraints alleged and conclude that none occurred in or substantially affected interstate commerce.

And, of course, a restraint of trade may be unreasonable if found to be so under the rule of reason, when that standard is applicable.

Plaintiff argues that because the practices complained of are per se violative of §1, examination under the rule of reason is inappropriate. It argues, in short, that the practices are illegal as a matter of law.

With equal vigor defendant contends that the provisions attacked were ancillary to a valid licensing agreement, a reasonable business practice. See Addyston Pipe and Steel Co. v. United States, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed 136 (1899). Kresge contends that it not only had the right, but the duty to exercise "quality control" over the use of its registered trade name. Defendant argues that plaintiff's per se theory rests on an erroneous factual premise, i. e., that Hempfield and Kresge were competitors. Kresge denies that they were competitors in any sense; it argues that they were *de facto* partners, each complimenting the other to provide full service one-stop shopping.

Kresge also argues that if the food stores did not have a competitive pricing policy, then consumers shopping K-Mart food stores and finding their prices not in keeping with the K-Mart image would not only have shifted their allegiance from the food stores but would also cease to associate the K-Mart name with discount prices. Therefore, defendant seeks to justify the pricing requirements as ancillary and reasonable to the licensing of its trade name.

We believe that it is necessary to evaluate the agreements between Hempfield and Kresge in the broader context which led to their execution and implementation before proceeding to a *seriatim* consideration of the alleged restraints. This is because we believe it is necessary to establish a frame of reference by which the restraints can be

judged. We will approach the problem by posing the following questions:

(1) What was the nature of the agreement between Hempfield and Kresge?

(2) Are the practices complained of to be examined under the rule of reason or does the per se doctrine properly apply?

(3) Were the alleged restraints violative of §1?

A. The Nature of the Arrangement

Kresge, in its brief, states:

> "It is impossible to 'peg' the K-Mart license agreements into any particular 'hole.' It is, of course, a license to use a registered trade name . .. Kresge, therefore, is required to maintain 'quality control' over the use of its name. It is similar to a 'franchise' agreement except that Kresge did not provide goods or services to Hempfield, but rather operated a different type of store adjacently under the same registered trade name." (Defendant's Brief, p. 38).

[41] We believe that despite the provision in both license agreements stating that "the parties do not intend this agreement to constitute a joint venture, partnership or lease . . ." defendant's analogy between its license agreements with Hempfield and franchise agreements is well taken. The fact that Kresge did not sell goods or services to Hempfield does not preclude a franchise type arrangement since that concept may apply to a method of doing business as well as to a method of distributing a particular product or line of products.

In the typical franchise arrangement a company (the franchisor) owns a trade mark or trade name which it

licenses to others (the franchisees) to use upon the condition that the users conform their business to standards established by the licensor insofar as that business is associated with the trade mark or trade name. A franchisor may pursue that method for any one of a number of reasons. In this case, Kresge chose to license its trade name because it lacked any source of distribution for groceries and because of its lack of experience in the business of selling retail food.

Franchise agreements invariably require a cooperative effort between the licensor and the licensee. While the agreements both contain the provision referred to above that they are not to be construed in such a way as to create a partnership, we believe that the conclusion that a type of *de facto* partnership was created is inescapable.

At oral argument, counsel for defendant observed that

> "While the agreement makes clear that we were not *de jure*, we were not legal partners obvisously for the reasons that we did not want, either one of us, to be bound by the principles or agency or partnership law. But if you cut through the legalities of the situation you find what I say is the equivalent of an ecomonic or *de facto* partnership where each has carved out, mutually and voluntarily, this sphere or area in which they are going to compete in a market already filled with other competitors filling the needs of the consumer who will purchase goods from both." (Tr. 6 Argument on Motion for Summary Judgment, Sept. 25, 1974).

We believe that the analogy between the present agreements and franchise arrangements is further strengthened by the facts surrounding the initiation of the Hempfield-Kresge relationship as well as many provisions in the agreements including, *inter alia*, (1) Hempfield agreed that upon termination of the license agreements it would discontinue all use of the K-Mart or any related name; (2)

Hempfield agreed to pay Kresge license fees as a percentage of gross sales in excess of a specified figure; (3) the parties agreed to a common advertising arrangement to be directed by Kresge, the cost of which was to be shared by Hempfield; and (4) there was an ongoing commercial relationship between the parties not only as to license fees and advertising but also as to other areas of operation.

We have drawn this analogy only for purposes of evaluating the conduct complained of. We realize that branding any particular agreement as a licensing agreement, a franchising agreement or by any other term, is no cure-all for the problem we must address. However, we believe that it does create a necessary starting point from which we may now proceed to examine the alleged restraint in greater detail.

B. The Appropriate Standard

In every case under §1 of the Sherman Act there are two routes to a finding of illegality: critically analyzing the competitive effects and possible justification of the challenged practice; or subsuming it under one of the per se rules. Plaintiff insists that the former approach is unavailable here. Defendant, on the other hand, contends that the practices cannot be summarily condemned under the per se doctrine for two related reasons.

First, defendant contends that the K-Mart merchandising concept is unique and that the courts lack sufficient experience with business relationships of the type created by the license agreements in question to permit application of the per se doctrine, citing United States v. Topco Associates, Inc., 405 U.S. 596, 607-608, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972), where the Court said:

"It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."

Secondly, defendant argues that the restrictions imposed on Hempfield are justified as ancillary to a lawful agreement which were necessary to protect legitimate business interests.

In Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962), a trade-mark owner, Spring-Air Company sued Denison, one of its licensees, for costs of advertising and other fees claimed under a contract. Denison contended that the contract was unenforceable because its provisions violated the antitrust laws by dividing trade territories, fixing prices, restricting the licensee in its purchase of materials, prohibiting the licensee from manufacturing and selling competing products, requiring the licensee to use Spring-Air's specifications and restraining the licensee from the sale or use of products or materials upon termination of the contract. The Court adopted an approach which looked to the primary purpose of the contract:

". . . [I]f the primary purpose of the contract is lawful, e. g., to protect one in the fruits of his labor, and if the arrangement was actuated by or could be explained on the basis of legitimate business justification as opposed to the desire to increase market control through economic leverage, then the court will generally hold any incidental restraint of trade, not harmful to competition of the public, to be lawful. (Citation omitted). Therefore, it is our duty to determine whether the general primary purpose of the contract under consideration was to protect Spring-Air in its product, and then determine more specifically whether the provisions of the contract complained of here violate any antitrust law." 308 F.2d at 408.

In Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951), the Supreme Court made it clear that antitrust violations are not insulated from the antitrust laws merely because they are part of an otherwise legitimate franchise arrangement. In *Timken*, the United States charged that Timken, a domestic corporation, had conspired with two foreign corporations in each of which it had a financial interest to restrain interstate and foreign commerce in the manufacture and sale of antifriction bearings. The Court rejected any argument that common ownership liberated the defendant from the impact of the antitrust laws. It continued:

"Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled.

"Nor can the restraints of trade be justified as reasonable steps taken to implement a valid trademark licensing system, even if we assume with appellant that it is the owner of the trademark 'Timken' in the trade areas allocated to the British and French corporations. Appellant's premise that the trade restraints are only incidental to the trademark contracts is refuted by the District Court's finding that the 'trade mark provisions [in the agreements] were subsidiary and secondary to the central purpose of allocating trade territories.' Furthermore, while a trademark merely affords protection to a name, the agreements in the present case went far beyond protection of the name 'Timken' and provided for control of the manufacture and sale of antifriction bearings whether carrying the mark or not." 341 U.S. at 598-599, 71 S.Ct. at 974.

[42] Therefore, despite our previous conclusion that the license agreements here created a type of *de facto* partnership, the holding in *Timken* precludes use of this finding as a possible justification for the restraints complained of. The determinative question then is whether the restraints can be justified under the ancillary restraints doctrine as announced in United States v. Columbia Pictures Corp., 189 F.Supp. 153, 178 (S.D.N.Y. 1960):

> "Where challenged conduct is subservient or ancillary to a transaction which is itself legitimate, the decision is not determined by a per se rule. The doctrine of ancillary restraints is to be applied. It permits, as reasonable, a restraint which (1) is reasonably necessary to the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary; (2) does not unreasonably affect competition in the market place; and (3) is not imposed by a party or parties with monopoly power."

To answer this question it is necessary to undertake a two-pronged inquiry: (1) What was the central purpose of the agreements in question; and (2) do the restraints meet the criteria of reasonableness under the ancillary restraints doctrine?

[43] In licensing its name to independent food store operators, Kresge was engaged in the business of selling an identity, i. e., a merchandiser selling quality items at discount prices. As such it had a valid interest in insuring that Hempfield maintained that image as part of the overall K-Mart design. Plaintiff has never seriously argued that the primary purpose of the agreement was anything other than what defendant says it was—attracting customers into the K-Mart stores by providing convenient one-stop shopping and quality merchandise at low prices. Therefore, we find that the primary purpose of the license agreements in question was lawful.

[44, 45] This finding, of course, does not preclude condemnation of the individual restraints if those restraints cannot be justified as ancillary to the lawful licensing agreement. Before turning to consideration of those restraints we note that defendant must show that the restraints were necessary to protect the K-Mart image since it is apparent that it made no effort to control the identity, origin or uniformity of the goods sold by Hempfield.

C. Alleged Restraints

1. *Identical Prices on Like Items.*

Notwithstanding our decision that the ancillary restraints doctrine governs the present case we will address plaintiff's argument that the provisions contained in both license agreements which required Hempfield to sell like items at identical prices constitute price-fixing and are, therefore, illegal per se. In support of its argument, plaintiff has cited a multitude of Supreme Court cases which establish that price-fixing agreements, however patent or subtle, and regardless of their purpose or immediate effect, are illegal per se. See e. g., United States v. Trenton Potteries, Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). From these cases plaintiff concludes that "like a rose, price-fixing is price-fixing."[23] Plaintiff, therefore, reasons that inasmuch as prices were undeniably fixed, a per se violation is established.

[46, 47] While it is now clear that schemes like the one here fixing maximum prices are per se illegal as well as those fixing minimum prices, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219

[23] See Oral Argument on Motions for Summary Judgment, September 25, 1974, Tr. 47.

(1951); Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed. 2d 998 (1968), defendant contends that plaintiff's per se theory is premised on an erroneous factual assumption, i. e., that Hempfield and Kresge were "competitors."

Decisional law has established that price-fixing within the intent of the Sherman Act is either horizontal (dealing with arrangements among competitors) or vertical (attempting to control resale prices). In this case it is immediately apparent that no vertical price-fixing exists. Therefore, the question narrows down to whether Hempfield and Kresge were competitors:

> "[B]efore we may say that such agreements (to fix prices, allocate territories, to tie in on sale patented with unpatented products and to boycott other competitors) are inherently unlawful, we must find that the agreements were made *between competitors*, actual or potential, dealing in competing products in a relevant market." United States v. Columbia Pictures Corp., 169 F.Supp. 888, 893 (S.D.N.Y. 1959). (Emphasis added).

Cf. Seligson v. Plum Tree, Inc., 361 F.Supp. 748, 755 (E.D.Pa. 1973). We find that Hempfield and Kresge were not competitors. In the first place, the Kresge department stores and the Hempfield grocery supermarkets were designed to sell entirely different kinds of merchandise. That was the reason for the agreements. The fact that somewhere between 2% and 5% of merchandise sold by Hempfield was also sold by defendant's stores does not, in our view, require a finding that Hempfield and Kresge were competitors. On the contrary we believe it shows they were not. Therefore, a holding that Hempfield and Kresge competed would ignore the intensely practical business realities which underlie the antitrust laws.

In his affidavit, Frank Zapalla, one of the Hempfield incorporators, states:

> "It was never our intention, or Kresge's, that in any sense we were to be competitors of each other, for under the arrangement, we were both to be selling under one roof and under the name of K-Mart entirely different kinds of merchandise."

[48] While plaintiff has relied almost exclusively on the per se theory, we have given careful consideration to this practice under the rule of reason. We conclude that the practice did not violate §1. Our reasons are three-fold: (1) the practice could not adversely affect the prices of the goods subject thereto; (2) defendant had no position of market dominance; (3) we believe that the practice was reasonably necessary to protect the K-Mart image and avoid customer confusion.

2. *Competitive Prices in the Trade Area.*

[49] Plaintiff has argued that the license provisions which called for Hempfield to sell its goods in "a suitable price range and competitive or lower in price with the same or similar merchandise and products offered for sale in other discount food stores in the trading area" should be deemed price-fixing. However, for reasons previously given, we believe that these provisions are properly treated as allegations that Kresge interfered with Hempfield's ability to exercise its independent business judgment.

In agreements of this type, there will inevitably be some interference with the licensee's unfettered discretion. The question here is whether that interference went too far? We think not.

In our view, these provisions did not require anything that Hempfield would not have had to do in any event. Kresge was merely protecting itself and the K-Mart image by requiring its licensee to remain competitive. Furthermore we find that the charge that Hempfield was used as a "loss

leader" to attract customers to defendant's store is not substantiated by the record. Plaintiff has stated that Hempfield followed Fox Grocery Company's gross profits pricing structure.

While it is true that plaintiff alleges that at various times Hempfield was required to sell merchandise at prices lower than those determined in accordance with the Fox guidelines, we do not believe that there is anything approaching an illegal restraint of trade.

3. *Limitations of Merchandise Hempfield was Permitted to Sell.*

[50]We find that in the circumstances which gave rise to the agreements challenged here, it was clear that both parties contemplated that each would engage in the sale of different types of merchandise. Kresge had an obvious reason for not wanting Hempfield to sell merchandise which was also sold in its stores and we find that under the facts presented here that the restraint was clearly justified.

4. *Prohibition of Fair Trade Agreements.*

[51] Under Pennsylvania's Fair Trade Act of 1935, 73 P.S. §7 et seq., contracts establishing minimum prices for the resale of a trademarked or similarly identified commodity, in free competition with products of the same general class produced or distributed by others are not illegal. See P.L.E. Trade and Commerce, §5.

[52] Plaintiff contends that the license agreements, by prohibiting Hempfield from entering into fair trade agreements with any party, unreasonably restrained trade by controlling and interfering with the prices at which Hempfield sold its goods at retail to the consuming public.

We find that this provision was not anti-competitive. We, therefore, feel that it is justifiable as ancillary to the basic purpose of the licensing agreements.

5. *Use of Trade Stamps.*

[53] The license agreements provided that Hempfield was not to issue trade stamps without the express permission of Kresge. We believe that defendant had a valid interest in insuring that its licensees adopt a uniform policy with respect to the issuance of trading stamps. We, therefore, hold that this provision did not constitute an unreasonable restraint of trade.

6. *Alleged Tie.*

In Count II of the Complaint plaintiff alleges, *inter alia:*

> "24. The License Agreement attached hereto as Exhibit 2 constitutes a contract in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act, and in violation of Section 3 of the Clayton Act, in that defendant tied to the licensing of its service tradename, and as a condition of the granting thereof, the requirement that the Bankrupt lease from it fixtures and equipment which the Bankrupt could have purchased or leased from others.
>
> "25. Said tying policy of defendant tends to substantially lessen competition in the leasing and selling of such fixtures and equipment."

[54] Defendant contends that it purchased the fixtures and equipment for this one store at the specific request of, and as an accomodation to, Frank Zapalla. However, notwithstanding this defense, we do not believe that a substantial amount of interstate commerce was affected by this practice. See Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964).

[55] A tying arrangement is an agreement under which a vendor will sell one product only if the purchaser agrees to buy an independent product as well. In order to find such agreements unreasonable in and of themselves, two

conditions must be found to exist: (1) the defendant must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; and (2) a not insubstantial amount of interstate commerce must be involved. See Susser v. Carvel Corp., 332 F.2d 505, 518 (2d Cir. 1964), cert. denied, 381 U.S. 125, 85 S.Ct. 1364, 14 L.Ed.2d 284 (1965).

We find that the conduct complained of did not have a substantial affect on commerce. See Lieberthal v. North Country Lanes, Inc., *supra*. In our view, this condition was at most an incidental restraint of trade.

Conclusion

After careful consideration of the motions before us, we have reached the following conclusions:

(1) The conduct complained of did not occur in the flow of interstate commerce; nor did it substantially affect interstate commerce. Therefore, the court does not have jurisdiction over the subject matter of this action.

(2) Notwithstanding the conclusion that the court lacks jurisdiction, we find that the license agreements challenged here had a legitimate primary purpose. We further find that the alleged restraints of trade were not unreasonable and are justifiable under the ancillary restraints doctrine.

(3) The counterclaims are properly left for final determination by the bankruptcy courts.

Therefore, it is appropriate to grant defendant's motion for summary judgment.[24]

It is so ordered.

---

[24]We express on opinion as to whether Hempfield's participation in the conduct complained of precludes recovery by its trustee in bankruptcy as a matter of law.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN EVANS, Trustee in Bankruptcy for HEMPFIELD STORES, INC., a Bankrupt,
Plaintiff
vs.
S. S. KRESGE COMPANY, a foreign corporation,
Dependent [sic]

Civil Action No. 71-85

AMENDED ORDER

AND Now, February 11, 1976, the motion of defendant for summary judgment on plaintiff's complaint is granted.

This order does not decide the defendant's counterclaims or the plaintiff's counterclaims against defendant.

This order enters final judgment for defendant on plaintiff's complaint.

There is not just reason for delay in entering this judgment and therefore it is expressly directed that the final judgment be entered for defendant on plaintiff's complaint pursuant to Rule 54(b).

/s/ BARRON P. MCCUNE
United States District Judge

Supreme Court, U. S.
FILED
MAR 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1033.

JOHN EVANS, Trustee in Bankruptcy for
HEMPFIELD STORES, INC., a Bankrupt,
Petitioner,

v.

S. S. KRESGE COMPANY, a Foreign Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Should this Court Grant Certiorari In this Case When the Commercial Relationship between the Parties and Facts are So Unique that None of the Criteria Under Rule 19(1)(b) of this Court Are Met?

2. Should this Court Grant Certiorari in this Antitrust Case When Petitioner Ignores Findings Below that Petitioner and Respondent Were Not Competitors, and Thus, There Was No Restraint of Trade by Virtue of License Agreements Entered Into by Petitioner and Respondent?

3. Should this Court Grant Certiorari Where Petitioner Urged the Lower Courts to Hold Certain Provisions of License Agreements to be *Per Se* Illegal, but the Lower Courts Held There Was No Basis in the Record for So Holding?

4. Should this Court Grant Certiorari Where the Provisions of the License Agreements are Lawful under the Ancillary Restraints Doctrine?

5. Should this Court Grant Certiorari to Review Rulings of the Lower Courts on the Proper Scope of Discovery?

COUNTERSTATEMENT OF THE CASE.

The issue in this case is whether the Court of Appeals erred in affirming Summary Judgment for Respondent in an antitrust case where both parties asked the District Court to rule on the validity of License Agreements whereby Petitioner operated a food supermarket as part of a unique merchandising concept under Respondent's registered "K mart" name. Both parties agreed there were no issues of fact and the primary issue now presented is whether the License Agreements were *per se* illegal.

Both the District Court and the Court of Appeals have correctly stated the facts (see Petition pp. 3a-6a, 27a-33a). The following summary will introduce the Arguments below.

Respondent ("Kresge"), long successful in operating low cost variety stores, decided in the early 1960's to expand the scope of its business operations. Under its federally registered service mark "K mart" Kresge developed broader range department stores whose emphasis was on a low margin, high discount, low cost, one-stop retailing service that would meet all its customers' day-to-day needs, including food, under one roof.

Since Kresge had no prior experience in food merchandising, it decided to license independent food supermarket operators to use the "K mart" name and operate under the same roof with the Kresge-operated department store. Petitioner ("Hempfield" d/b/a "K mart Foods") was one of these supermarket operators.

The key to the entire operation was that the whole store should appear to be one business, rather than two separate businesses (supermarket and department store).

This arrangement has been variously described as a licensing agreement, a *de facto* partnership by the District

Court (pp. 67a-69a) and as a "concession" by the Court of Appeals (pp. 14a-15a).

Both Courts suggested that this unique relationship probably could not be pidgeonholed into any one category, but rather had elements of all of these arrangements. Kresge would sell department store general merchandise items, and the supermarket would sell food items, all under one roof. Both would benefit from each other's customers, and the food supermarket operator would benefit from the K mart advertising, service mark, public image and reputation as a discount, low cost, high quality merchandiser.

As a part of this unique joint enterprise agreement, both participants recognized that their efforts would have to be co-ordinated. As the Court of Appeals recognized at p. 17a, "both Kresge and Hempfield presented a common front under a common name to the customer." With Kresge running the department store part, and Hempfield running the supermarket part, there had to be a general definition and coordination of who would sell which goods, and how to price those few goods sold in common by both departments, such as health and beauty aids (which products amounted to not more than 2-5% of Hempfield's sales) (p. 5a).

All the signatories to the initial License Agreements between Hempfield and Kresge agreed, for the mutual benefit of both stores, that those limited items sold in both parts—under the same roof and same K mart name—would be sold at the same price. Otherwise, there would be customer confusion and total bewilderment if the same goods were sold at different prices in what was one K mart Discount Department store. Furthermore, Kresge's valuable high discount-low price K mart image would be seriously eroded in consumers' eyes if the food operator charged a *higher price* for non-food items sold in common.

Additionally, K mart wanted to be sure, again to protect its discount image and to avoid penalizing its valued customers, that Hempfield food market prices on food items were competitive with other food stores in the marketing area.

It was for all the above described reasons that in 1963 and 1964, Kresge and the original owners of Hempfield's corporate predecessor ("Skat-Zap"), entered into the specific License Agreements for two food supermarkets to be operated as part of two K mart stores in the Pittsburgh, Pennsylvania area.

The License Agreements, in order to preserve and protect the registered K mart trade name identification with the widely-advertised "discount" image of quality goods and competitive prices, also stated that Hempfield had to respect Kresge's K mart standards for the conduct of business, such as courteous service, fire prevention, and clean premises.

Under the agreements, the licensee was authorized to *select and sell* all food items and categories of non-food items commonly sold in supermarkets.

The essential points in the record that support the above discussion of the mutually agreed to reasons for, and acceptance of, this unique relationship between Kresge and Hempfield appear in the uncontradicted affidavit of Frank J. Zappala, one of the three original owners of Hempfield's corporate predecessor.[1] This affidavit, which

1. The important points covered in the Zappala affidavit, as corroborated by the affidavit of Ralph Phelps, then Kresge general counsel, are:

(a) Kresge and Hempfield both wanted the K mart program to be a competitively priced, discount retail operation.

(b) The two stores were designed to appear to the public as a single unit, to encourage "one stop" shopping, although actually coordinated under separate management.

(c) Kresge did not at any time sell any goods or services to the Hempfield supermarkets—it only licensed Hempfield to

was not challenged or refuted, was heavily relied on by the Court of Appeals and the District Court (pp. 20a-23a, 74a-75a), but is not even mentioned in the petition for certiorari.

After approximately three years of very active discovery, including full exchange of documents, answers to numerous interrogatories and numerous depositions, Kresge moved for summary judgment under Rule 56, Federal Rules of Civil Procedure, asserting three separate and independent legal bases for its Motion:

1. No subject matter jurisdiction.

2. The written agreements on which Hempfield sued were lawful.

3. Hempfield was barred from claiming that the agreements violate section 1 of the Sherman Act.

Hempfield, conceding that there were no factual or procedural barriers to summary judgment, also moved for "partial summary judgment" that subject matter jurisdiction existed and that the agreements were *per se* unlawful. Thus, both parties consented to the Court deciding, on cross summary judgment motions, the validity of the written agreements on which Hempfield's claim was based.

The District Court granted Kresge's Motion for Summary Judgment holding that subject matter jurisdiction did not exist and that the License Agreements did not violate Section 1 of the Sherman Act.

The Court of Appeals agreed that there were no issues of material fact in dispute, and affirmed the judgment of

1. (Cont'd.)
use the K mart registered trade name. Hempfield was free to purchase its goods from whatever source it desired.

(d) The K mart department store, operated by Kresge, and the supermarket, operated by Hempfield, were not to compete with each other—otherwise, the entire program would be a nullity.

the District Court. The Court of Appeals affirmed on the substantive issue only, holding that subject matter jurisdiction existed.[2]

Kresge believes the District Court opinion was correct on all points and the Court of Appeals' opinion was correct in sustaining summary judgment on the ground that the Sherman Act was not violated.

2. Kresge believes the jurisdictional holding by the Court of Appeals misapplied this Court's recent decision in *Hospital Building Co. v. Trustees of Rex Hospital* (pp. 9a-10a), reported in 96 S. Ct. 1848 (1976). Decided after the oral argument in the Court of Appeals, its effect on the facts of this case was never argued or fully briefed. However, Kresge has not requested this Court to review this aspect of the case.

REASONS FOR DENYING THE WRIT.

A. The Commercial Relationship in This Case Is So Unique That It Presents No Questions of National Importance, and Cannot Be a Precedent for Other Cases; and the Issues Presented Do Not Satisfy the Criteria for Certiorari Under Rule 19(1)(b).

The present case is a private suit involving unique facts in a situation which both courts below recognized as *sui generis*.[3] The Court of Appeals emphasized the unique facts of this case, and the absence of any prior judicial decision evaluating a similar business arrangement (p. 14a). Accordingly it presents no broad questions of national antitrust policy, nor does it have any precedential value for other parties.

Rule 19(1)(b) of this Court's Rules sets forth the considerations governing review on certiorari of a case from a court of appeals:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable

3. The record also reflects changes in the license agreements used by Kresge since the Hempfield agreements were signed in 1963 and 1964. Kresge's agreements after 1969 did not contain the identical pricing provisions complained of by Hempfield. No other licensee has sued Kresge under Section 1 of the Sherman Act. These circumstances emphasize even further the lack of precedential value to the present case; and therefore, an opinion by this Court on these facts is not important for guidance of lower courts in their interpretation of Section 1 of the Sherman Act.

decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Considering these criteria in order:

1. Hempfield points to no decision from this Court or another Court of Appeals in conflict with the present decision, nor can it, since the present situation is unique; [4]

2. There is no question of state or territorial law in this case;

3. As stated above there is no "important question of federal law which has not been, but should be, settled by this court" since the unique facts would have no precedential value for other antitrust cases;

4. Indeed, the only case even arguably similar to the present case is *People ex rel. Scott v. Convenient Food Mart, Inc.*, 21 Ill. App. 3d 97, 315 N. E. 2d 124 (App. Ct. Ill. 1974). In that decision, an Illinois Appellate Court ruling under the state antitrust act, using the federal "rule of reason", sustained a much more restrictive pricing policy than in the instant case, and upheld the importance of trade mark identification of a "way" of doing business, as well as for identification of particular goods. In both the Illinois case and the instant case, the restrictions were correctly sustained as part of a franchisor's obligation to maintain quality control. The Illinois Court cited many of the federal decisions discussing "quality control" that Kresge relied on in this case, and concluded (315 N. E. 2d at 132):

> While franchisors cannot violate antitrust laws any more than anyone else, franchisors are unique in that some control must be exercised over their franchisees in order to maintain quality and standards of the franchise operation. In situations where identification with a franchisor's trade mark is the basis of restrictions on a franchisee, the imposition may be justified on the ground that the holder of the trade mark must control the quality of the seller's goods or run the risk of giving up his rights in the mark. . . .

4. It is clear from a reading of the two opinions below that both courts gave careful and painstaking deliberation to this case and did not depart "from the accepted and usual course of judicial proceedings . . . [so] as to call for an exercise of this court's power of supervision."

Therefore, certiorari should be denied. See *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955).

B. Certiorari Should Also Be Denied Because Hempfield's Petition Ignores the Findings Below That Kresge and Hempfield Were Not Competitors, and Thus There Was No Restraint of Trade.

Hempfield's first argument attempts to bring the present case within #1 above, claiming that the judgment below conflicts with Supreme Court decisions that the intentions of the parties will not save a price-fixing agreement from being *per se* unlawful. The lower Courts did not so hold. The two lower courts did not sustain the Kresge-Hempfield arrangement merely on the basis of the parties' intention, but rather, on the basis that there was, in fact and law, no competition, no "price-fixing" and further, no restraint on trade (pp. 16a-18a, 65a-67a).[5] It is anomalous to contend that *de facto* partners, as were Kresge and Hempfield, were also competitors, and it is contrary to the uncontradicted affidavits and other evidence of record.

Hempfield erroneously persists in characterizing the License Agreements as "naked price-fixing." The Court

5. The District Court stated, "We find that Hempfield and Kresge were not competitors" p. 74a. The Court of Appeals held "Here, the relationship established by the parties demonstrate to our satisfaction that the necessary element of competition is lacking" p. 16a. Thus, this case does not fall into the "horizontal" category of per se arrangements, and, because there was no supply of goods by Kresge to Hempfield, it is not a "vertical" case.

of Appeals and District Court held that the license provisions were designed to and did help Kresge and Hempfield together form a unique merchandising concept to more effectively compete against other department stores and supermarkets, and thus serve a legitimate business purpose, and the consuming public.

Accordingly, the two courts below were correct in holding that Kresge's identical pricing policy as to the very small volume of common non-food items sold by Kresge and Hempfield was lawful and reasonable because Kresge and Hempfield were not competitors. See also *United States v. Columbia Pictures Corp.*, 169 F. Supp. 888 (S. D. N. Y. 1959); *Knuth v. Erie-Crawford Dairy Cooperative Assn.*, 326 F. Supp. 48, 53, aff'd on this point, 463 F. 2d 470 (3d Cir. 1972), cert. denied, 410 U. S. 913.

Furthermore, the identical pricing policy itself was reasonable because Kresge had no market dominance whatever and could not adversely affect the market prices of the few non-food goods sold subject to this policy. The record showed the many other stores in the Hempfield area selling supermarket-type goods. Furthermore, it was necessary to the joint enterprise that both participants have a consistent pricing policy to avoid customer confusion and disenchantment. Otherwise, customers would be confronted with the anomaly of certain non-food goods being priced one way at one counter and another way at a nearby counter in what was designed to appear to be the same store.

Just as the identical pricing policy was reasonable as to common non-food items, so the competitive pricing policy was reasonable as to food items sold in Hempfield's "K mart Foods" concessions. Both policies were valid and ancillary to the purpose of license agreement.

Hempfield nevertheless contends that the competitive pricing policy was unlawful because it interfered with

Hempfield's business judgment on pricing. However, the Zappala affidavit demonstrates that Hempfield did exercise its independent business judgment by agreeing to be part of the K mart enterprise, fully knowing of the policy of competitive retail prices, and, on this basis, voluntarily entering into the contract with Kresge. In any event, how otherwise could a supermarket survive in the marketplace if its prices were not "competitive"? An agreement to charge "competitive" prices is neither sufficiently specific or restrictive to bring it within the ambit of any Sherman § 1 case previously decided.

Furthermore, the agreements on pricing policy were justified as ancillary because Kresge was merely protecting its federally registered service mark by requiring its retail licensee to remain competitive. This provision was no different than the other protective measures concerning maintenance of courteous service, fire prevention, and clean premises.

In the context of Hempfield's agreement to be a K mart Foods licensee, Hempfield did not have unfettered discretion to do as it pleased. Hempfield did not have the right to take Kresge's laboriously established trade name and subvert it to turn a quick profit by overpricing retail goods. This is further corroborated by the Zappala affidavit wherein Zappala, acting for Hempfield's corporate predecessor, agreed that the purpose of the agreement was for the mutual benefit of *both* parties. Since Hempfield took the benefits of the K mart name and reputation, it took the responsibility to protect it. Similarly, since Kresge undertook the burdens of establishing a trade name and then licensing it and leasing space to a food concessioner, Kresge had the *need* and right to protect it from dilution and disreputation.

Petitioner states [petition p. 11] that the Court of Appeals did not specifically discuss this competitive price

policy. However, the Court of Appeals did implicitly affirm the District Court's discussion of it (pp. 75a-76a) by holding that the restraints "serve a legitimate business purpose".

Accordingly, both courts below were correct in concluding that the Kresge pricing policies were reasonable.

Kresge licensed Hempfield to operate a K mart food supermarket. Hempfield could carry any and all food goods. The non-food inventory to be carried by Hempfield was described in the two License Agreements. Hempfield claims the limitation was *per se* illegal.

As with the other provisions, this limitation on non-food items was a valid ancillary part of the License Agreements. The District Court's opinion of February 27, 1974, refused to allow an amendment to the complaint (three years after the case had started) on this issue, which was not pleaded initially. That opinion correctly recognized that it was a "minor" issue.

Petitioner cites *United States v. Topco Associates*, 405 U. S. 596 (1972). That case involved territorial restrictions, and has nothing whatsoever to do with the present case. There is no case which has held, in the context of a de facto partnership, or a "concession", that limitations on the extent of inventory are *per se* illegal. Kresge never limited Hempfield's choice of supply, or the brands it could carry, or the price it paid for its merchandise. It would be absurd for Kresge to license another entity which could then sell all the same goods as Kresge.

C. There Was No Basis to the Record to Declare the License Agreement Provisions Per Se Illegal.

The Court of Appeals carefully considered Hempfield's claims that the Kresge license provisions complained of were *per se* illegal. The lower court emphasized the

unique nature of the Kresge-Hempfield relationship. Hempfield's petition ignores the prior decisions of this Court, relied on below, which hold, "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . ." *United States v. Topco Associates, Inc.*, 405 U. S. 596, 607-8 (1972). In the absence of such experience, the Court will not classify unique business relationships as *per se* violations. *White Motor Co. v. United States*, 372 U. S. 253 (1963).

The Court of Appeals held, in the context of the overall arrangement, that the restraints complained of "serve a legitimate business purpose . . . [and] are not illegal *per se*" (p. 18a).

In the present case, the facts set forth above demonstrate a unique "joint venture-concession" situation which defies classification, for it has elements of a franchise and a concession as well as a *de facto* partnership. As already demonstrated, both courts below recognized this, and held there was not sufficient experience with this type of arrange to classify it as a *per se* violation of the Sherman Act.

D. This Court Should Not Review This Case Because the Limited Restraints Agreed to by Kresge and Hempfield Are Lawful Under the Ancillary Restraints Doctrine.

The Court of Appeals held the complained of restraints were "incidental" to the business relationship. The District Court applied the doctrine of ancillary restraints as set forth in *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 178 (S. D. N. Y. 1960), which permits, as reasonable, a restraint which:

> (1) is reasonably necessary to the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary;

(2) does not unreasonably affect competition in the market place; and

(3) is not imposed by a party or parties with monopoly power.

As detailed below, the agreements under review meet all the above tests.

1. The Ancillary Restraints Are Reasonably Necessary to the Legitimate Primary Purpose of the Arrangement.

Kresge licensed its trade name "K mart" and had a need and a *right* to exercise quality control over the licensee of the trade mark. *Denison Mattress Factory v. Spring-Air Co.*, 308 F. 2d 403 (5th Cir. 1962); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F. 2d 358 (2d Cir. 1959). Furthermore, Kresge had a *duty* to do so. Failure to comply with this duty can result in legal abandonment of the federally registered mark. *Dawn Donut Co., supra; E. I. duPont deNemours & Co. v. Celanese Corp. of America*, 167 F. 2d 487 (Ct. of Cust. and Pat. Appeals 1948).

The disputed clauses in the K mart License Agreements were within this right and duty. They were reasonably necessary to the legitimate primary purpose of this licensing arrangement. Cooperation and business success could only be fostered if there was intra-store coordination between Kresge and Hempfield. Therefore, they had to charge the same prices for the few non-food identical items, had to have the same general policy of competitive pricing and operations, and had to present a common front to the public as to the limited items sold in common with each other. In effect, the clauses were similar to a limited covenant not to compete, and such covenants are reasonable and lawful. *Savon Gas Stations No. Six v. Shell Oil Co.*, 309 F. 2d 306 (4th Cir. 1962) cert. denied 372 U. S. 911 (1962), *Syntex Laboratories, Inc. v. Norwich Pharmacal Co.*, 1970 CCH Trade Cases ¶ 73,372 (S. D. N. Y. 1970). See also *People ex rel. Scott v. Convenience Food Mart, Inc., supra.*

For these reasons, the restraints in this case were reasonably necessary to the legitimate primary purpose of the arrangement, which was to maintain quality control in the use of Kresge's trademark "K mart".

2. The Restraints Do Not Unreasonably or Unfavorably Affect Competition in the Market Place, But Were in Aid of Competition.

There was no dispute that there were many other stores in the eastern suburbs of Pittsburgh selling the same items sold by Kresge and Hempfield. Kresge did not affect these stores in any way whatsoever, nor did Kresge restrict or dictate Hempfield's sources of supply or the prices Hempfield paid for its merchandise.

Furthermore, the materials attached to the James Stangl Affidavit (filed in support of Kresge's motion) established beyond doubt that Hempfield had a miniscule part of the overall local market of retail food stores. Accordingly, Kresge's policies could not have had any unreasonable effect on competition in the market place. Indeed, an insistence on "competitive" prices is beneficial to the consuming public.

3. The Restraints Have Not Been Imposed by a Party With Monopoly Power.

It is also beyond dispute, not only that Hempfield had a very small part of the food supermarket business in its marketing area, but also that Kresge had many competitors which sold the same items. Hempfield does not contend that Kresge had monopoly power in its market.

Therefore, Kresge has met all three criteria of the ancillary restraints doctrine as announced in *United States v. Columbia Pictures Corp., supra,* and, the District Court was correct in holding that the ancillary restraints doctrine is applicable to this case.

E. The Lower Courts Did Not Err in Ruling on the Scope of Discovery.

Hempfield's last issue (pp. 15-17) is that the scope of its pretrial discovery was erroneously limited by the District Court. Hempfield had sought information concerning all other K mart food stores licensed by Kresge, and the licensing arrangements with other stores. The District Court correctly ruled that these other stores and arrangements were irrelevant; it was only the Kresge-Hempfield relationship which is relevant.

Hempfield never alleged that Kresge attempted to control an entire market, or engaged in any activity beyond allegedly interfering with the retail sales practices of Hempfield's stores. Therefore, Kresge's other licensing arrangements are outside the scope of the allegations against Kresge, and hence irrelevant.

Rule 26 of the Federal Rules of Civil Procedure only permits discovery of relevant material. Since the material requested by appellant was not relevant, the District Judge was correct in refusing those requests.

On review, the Court of Appeals correctly noted that the sought-after discovery was strictly for jurisdictional purposes (purportedly, to show that because Kresge's policies vis-a-vis Hempfield were applied on a nationwide basis, they affected interstate commerce), and therefore that issue was mooted by its decision that subject matter jurisdiction existed in this case (p. 24a).

However, in its final argument in its petition to this court, Hempfield tries to imply that the case should have

been remanded for further discovery on the rule of reason and the commercial impact of the K mart License Agreement provisions (pp. 16-17). This is a blatant attempt by Hempfield to create an issue that did not exist in the courts below, because Hempfield only wanted further discovery for purposes of proving subject matter jurisdiction, not for purposes of proof on the rule of reason.

Hempfield has always argued that this case involves *per se* violations of the antitrust laws, and Hempfield never made any argument that the rule of reason was involved in this case. (See p. 75a.) This was the basis for its Motion for Partial Summary Judgment. Nonetheless, the Court of Appeals addressed this issue, and found that Hempfield had failed to show an unreasonable restraint on trade. The sought-after discovery would not make any difference in the Court of Appeals treatment of this issue.

One final point is of considerable significance in view of this Court's recent decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 45 U. S. L. W. 4138 (1/25/77).

Hempfield attempted to expand the scope of discovery in order to inquire into the practices of the Kresge Company nationwide, and particularly into transactions of all K mart stores. Hempfield fails in its present petition, as it did in the two lower courts, to establish that it had any standing to raise or litigate issues that did not and could not cause damage to its own "business or property." In *Brunswick Corp., supra,* this court reaffirmed the antitrust requirement that plaintiff is entitled to sue only for damages to *its* "business or property." Accordingly, the scope of the petitioner's pretrial discovery was correctly limited to the relevant issues in this case.

CONCLUSION.

Respondent S. S. Kresge Company prays that the Petition for Writ of Certiorari Be Denied.

Respectfully submitted,

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No. 76-1033

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN EVANS, TRUSTEE IN BANKRUPTCY FOR HEMPFIELD STORES, INC., PETITIONER

v.

S. S. KRESGE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's order of April 4, 1977, inviting the Solicitor General to express the views of the United States.

1. A. Respondent "Kresge" operates department stores throughout the country under both the Kresge and "K-Mart" trade names. Its "K-Mart" stores sought to achieve a reputation for selling quality merchandise at low prices and required a high volume of sales in order to be profitable (Pet. App. 27a). In order to generate customer traffic respondent sought to offer "one stop shopping" by providing a "K-Mart" food store operation under the same roof as its department store. Having little experience in the food merchandising business, it decided to license

its trade name to independent food store operators "who would conduct a K-Mart Food Store operation as part of or adjacent to a K-Mart department store" (*ibid.*).

In this case, petitioner's predecessor in interest, a food store firm, was organized for the purpose of operating food stores under the K-Mart trade name in two K-Mart facilities. Under the arrangement with Kresge, each food and department store was to appear to the public to be a single discount operation; in fact, each was independently owned and operated. The food stores, however, could not use the K-Mart brand name on their goods, checks, stationery or pricing labels, and Kresge did not sell to petitioner or dictate its sources of supply (Pet. App. 29a). The license agreement also required the food stores to

> (1) charge prices identical to those charged by Kresge on "like items," i.e., items sold by both the food stores and the department stores which prices were established by [Kresge] in the event the parties were unable to arrive at a mutually agreeable price; [(2)] maintain merchandise "competitive" in price with the same or similar goods offered for sale in the trading area; (3) limit non-food merchandise offered for sale to specific categories of goods * * *. [Pet. App. 30a-31a; footnote omitted.]

The two food stores' annual gross sales after 1965 exceeded $4 million (Pet. App. 30a, n. 4), of which two to five percent were "like items" (Pet. App. 74a). In July 1969 the food stores went bankrupt (Pet. App. 28a).

Contending that the restrictions in the license agreement contributed to the food stores' collapse, the trustee sued Kresge for treble damages under Section 1 of the Sherman

Act, 26 Stat. 209, as amended, 15 U.S.C. 1, alleging that the restrictive provisions were illegal *per se*. Kresge denied that the restrictions were illegal *per se*, and further contended that the challenged restrictions were lawful under the rule of reason[1] (Pet. App. 26a).

B. On cross-motions for summary judgment, the district court dismissed the complaint for lack of subject-matter jurisdiction because it found that the restrictions did not affect interstate commerce (Pet. App. 44a-65a). In the alternative, however, it held that the arrangement was not illegal *per se* because Kresge and the food stores were not competitors. Moreover, it held the restrictions were not an unreasonable restraint of trade under the rule of reason because the primary purpose of the arrangement— jointly to provide a one-stop shopping system under a single trade name—was lawful, and the restrictions were reasonably necessary to that purpose (Pet. App. 72a-76a). In so ruling, the district court had before it, *inter alia*, an uncontradicted affidavit submitted by Kresge in which one of the food stores' founders stated that the primary purpose of the arrangement was to create the image of a unified discount operation being conducted under one roof and trade name (Pet. App. 20a-23a).

C. The court of appeals held that the arrangement affected interstate commerce and affirmed the district court's decision on the merits (Pet. App. 6a-11a). It agreed that the restrictions should not be tested under the *per se* rules. The arrangement, it found, combined elements of franchising, trademark licensing, and joint merchandising

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[1]The agreements also contained restrictions concerning fair trade agreements and trading stamps, and a requirement that certain equipment be acquired from Kresge, but on appeal petitioner abandoned his challenge to these provisions (Pet. App. 5a, n. 9).

into a novel form of hybrid business arrangement, analogous to a "concession," with which the courts had no experience. It could not conclude that this arrangement almost invariably would have a pernicious effect on competition warranting condemnation as illegal *per se* (Pet. App. 11a-18a). It agreed with the district court that simple price-fixing was not involved, even as to the commonly sold items, because the parties held themselves out to the public as a single entity and there was no real competition between them (Pet. App. 16a-17a).

In analyzing the arrangement under the rule of reason, the court noted that petitioner did not contest Kresge's contention that the restrictions were reasonable. It held that the uncontradicted affidavit describing the purpose of the arrangement constituted "the only 'relevant facts,' " and that the restraints were incidental to a legitimate business operation that did not suppress or destroy competition (Pet. App. 18a-19a, 23a).

2. A. The decision of the court of appeals is consistent with this Court's decisions defining the circumstances in which conduct is illegal *per se* under the Sherman Act.[2] The court of appeals recognized the settled rule that agreements between competitors to fix or stabilize prices are illegal *per se* (Pet. App. 12a-13a), and that franchising through a trademark license does not insulate the licensor from that principle (Pet. App. 14a, n. 23).[3] The court correctly concluded, however, that the novel merchandising arrangement involved, which held out to the public the image of a

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[2] *White Motor Co.* v. *United States*, 372 U.S. 253; *United States* v. *Northern Pacific Railway Co.*, 356 U.S. 1; *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310.

[3] *United States* v. *Sealy, Inc.*, 388 U.S. 350; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593.

single entity pursuing a single discount pricing policy, did not involve separately competing entities, even with respect to commonly sold items.

The court properly recognized that it would be inappropriate to assess this hybrid business arrangement under antitrust criteria developed for other situtations (Pet. App. 15a). This was not a case in which two actual or potential competitors in the same line of commerce sought to eliminate price competition between each other by combining their operations under cover of a franchise, trade license or joint venture. See *United States* v. *Sealy, Inc.*, 388 U.S. 350, and *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593; cf. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596. Instead, this is a novel arrangement whereby two firms in different lines of commerce sought to engage jointly in complementary business operations under the same roof and trade name. Petitioner did not attempt to show that either firm would have independently undertaken a dual food-department store operation. Kresge desired the traffic volume generated by a food store operation and conditioned its lease commitment on obtaining such a "partner"; the food store operators sought to benefit from the K-Mart name, its advertising and customers (Pet. App. 21a).

Contrary to petitioner's assertion (Pet. 10), the court's decision was not based solely upon its finding that the parties never intended to compete with each other. Rather, the court viewed the evidence of intent as corroborating the "fact of noncompetition * * * dictated by the practical business arrangement of the parties" (Pet. App. 17a-18a). Cf. *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86. In view of the unusual relationship between the parties, the lack of judicial experience with such arrangements, the fact that the principal purpose of the parties

was legitimate, and the incidental nature of any competitive restraint, we submit that the court correctly refused to apply *per se* standards to the challenged arrangement. *White Motor Co.* v. *United States,* 372 U.S. 253.

B. Petitioner did not contend in either court below that the validity of the arrangement under the rule of reason should not have been decided on summary judgment. In the district court, despite respondent's argument that the restrictions were not illegal *per se,* and that they were justified under the rule of reason, petitioner contended solely that the practices were illegal *per se* and therefore were unreasonable as a matter of law. It did not contest respondent's affidavits describing the origins, nature and purpose of the arrangement, or argue that assessment of restrictions under the rule of reason was inappropriate on summary judgment. Fed. R. Civ. P. 56(e). It contended only that the jurisdictional issue should not be decided on summary judgment (Pet. App. 40a-44a).

Before the court of appeals, petitioner principally argued that the restrictions were illegal *per se,* that the amount of commerce involved was immaterial, and that the ancillary restraints doctrine was inapplicable to conduct illegal *per se* (Br. for Appellant, pp. 13-33). Indeed, the court of appeals noted that petitioner had "failed to address itself to the issue of the restraints' legality under the rule of reason" (Pet. App. 19a), just as he had failed to discuss this issue in the district court.

Petitioner now contends that in the court of appeals he argued alternatively that if his *per se* contentions were rejected, the summary judgment should have been reversed to enable him to pursue discovery (Br. for Appellant, pp. 37-42). But this argument assumed that if the *per se* analysis were rejected, the case would nevertheless be remanded for trial. We do not understand the basis for this assumption,

since the district court alternatively had held on the merits that the arrangement was reasonable, and had noted the absence of any serious contention by petitioner that "the primary purpose of the agreement was anything other than what [Kresge] says it was—attracting customers into the K-Mart stores by providing convenient one-stop shopping and quality merchandise at low prices" (Pet. App. 72a).

This Court has held that in complex antitrust litigation, where motive and intent play leading roles, summary judgment should be used sparingly. See, *e.g., Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495, 500; *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473. In this case, however, which has been pending since 1971, petitioner had the opportunity to, and did conduct extensive discovery. Indeed, Kresge's first motion for summary judgment was denied in 1972 to give petitioner an opportunity for discovery (Pet. App. 25a). In these circumstances, further discovery is unlikely to illuminate the issues. The court of appeals' failure, *sua sponte,* to rule that summary judgment was inappropriate, is not plain error. *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253, 284-290.

Since the propriety of summary judgment was not raised or considered by the court of appeals, and petitioner had "prolonged and extensive discovery" (Pet. App. 25a), there is no reason for this Court to consider petitioner's belated arguments that summary judgment was improper. Nor, in view of petitioner's failure to present the question here, should the Court consider whether the restrictions were reasonable ancillary restraints.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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